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A CONCISE TREATISE

ON

THE LAW

RELATING TO

EXECUTORS AND ADMINISTRATORS.

BY

ARTHUR ROBERT INGPEN,

OF THE MIDDLE TEMPLE AND OF LINCOLN'S INN, ONE OF HIS MAJESTY'S COUNSEL,
BACHELOR OF LAWS OF THE UNIVERSITY OF LONDON,

One of the Editors of "Williams' Law of Executors and Administrators"
and of "Seton's Judgments and Orders."

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SECOND EDITION.

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THE RIGHT HONOURABLE SIR SAMUEL THOMAS EVANS

PRESIDENT OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE.

PREFACE

TO THE SECOND EDITION.

During the period of five years since the publication of the First Edition of this work I have endeavoured to note in the preparation of this Second Edition every decision bearing on the subject-matter. In so doing nearly 500 additional cases have been inserted. References have also been made to twenty-three additional statutes. The Finance Acts, 1910 and 1911, have necessitated many alterations in the Chapter on Death Duties, and it is hoped that with these alterations and a few other additions it will continue a useful aid, in a concise and what may be styled an authoritative form, to mastering this intricate subject. The revision entailed in introducing each new case has resulted in considerable modification and addition to parts of the work, which it is hoped will add greatly to its value. At the same time every effort has been made to keep the work within reasonable dimensions. The cases from the current Law Reports have been noted to the month of September, 1913. Great care has been taken during the process of revision to perfect the General Index. I am indebted to my son Mr. Arthur Lockyer Ingpen, of the Chancery Bar, for assistance in revising the proof sheets in going through the press.

A. R. I.

September, 1913.

PREFACE

TO THE FIRST EDITION.

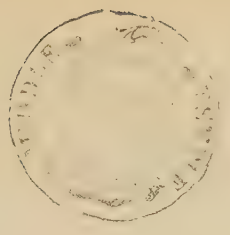
This work is intended not merely as a book of easy reference, but as an attempt to express in a concise form the general principles of the law relating to executors and administrators. As a model for guidance it follows the great work of Sir Edward Vaughan Williams on that subject, to which frequent references are made. It is intended for the use of the practitioner and student, and as an introduction to the greater work, which is recognised by the Courts as an authoritative statement of the law, and where alone is to be found collected the mass of authorities showing the gradual growth of the subject. At the same time the present work contains much that is new, and the subject has been considerably rearranged. For convenience, references are made to the 10th edition (1905) of Williams on Executors, but in most instances they will be found to be in the learned author's own words taken from the early editions which he himself supervised. Whenever of late years the authorities have been reviewed and a principle re-stated by the Court, the principle so stated has been embodied in this treatise with a reference to the case, omitting earlier authorities, which can easily be ascertained when necessary from the report itself or from the larger work on the subject.

The Public Trustee Act, 1906, which came into operation on the 1st January, 1908, constituting a Public Trustee, as a

corporation sole with perpetual succession, and authorising the Public Trustee, under that name, to be appointed to and to accept the offices of executor and administrator, and vesting in him extensive administrative powers, introduces a useful innovation into the law relating to executors and administrators which may have important results. This Act, with the rules made under it, is given in full in the Appendix.

A. R. I.

July, 1908.



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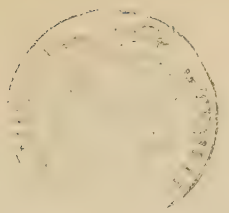

THE LAW RELATING

TO

EXECUTORS AND ADMINISTRATORS.

INTRODUCTION.

Meaning of legal personal representative.

THE legal personal representative of a deceased person is either the executor or person to whom the execution of a last Will and Testament of personal estate is, by the testator's appointment, confided (*a*), or the administrator or person deputed by the Court to administer the estate of the deceased in case of intestacy or where there is no executor or no executor willing or capable to act.

Property which vests in him.

The personal estate of the deceased vests in the executor or administrator, and in the case of deaths after the 31st of December, 1897, that is, after the commencement of the Land Transfer Act, 1897, the real estate also, except land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

Difference between executor and administrator.

Executors and administrators differ in little else than in the manner of their constitution (*b*).

Title.

The executor derives his title from the Will, and the property of the deceased vests in him from the moment of the testator's death (*c*). The probate is only evidence of the

(*a*) Toller (1822 ed.) 30.

(*b*) Fonblanque on Equity (5th ed.), vol. 2, p. 378.

(*c*) Woolley *v.* Clark, (1822) 5 B. & Ald. 744.

executor's right (*d*). An executor is a complete executor, as to every intent but bringing of actions, before probate (*e*).

The administrator derives his authority entirely from the appointment of the Court. He has no title until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (*f*). As a general rule a party entitled to administration cannot act before letters of administration are granted to him (*g*).

Powers.

After the administration is granted, the interest and power of the administrator is equal to and with the power and interest of the executor (*h*).

No administration of any sort can be granted when there is an executor willing and capable to act, he being *universi juris hæres* to his testator (*i*).

Duration of office.

Unless the appointment of executor is limited in point of time or for a particular purpose, it endures during his whole lifetime, and he cannot renounce or retire from the office after having once acted. The Court will, however, revoke the probate under special circumstances (*j*), and it would seem that under the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), the Court can, without revoking probate, in a proper case remove the executor and appoint a judicial trustee in his place (*k*). Moreover, under the Public Trustee Act, 1906 (6 Edw. VII. c. 55), ss. 3 and 6, after probate or grant of administration estates may be transferred to the Public Trustee for administration (*l*).

The office of administrator, unless limited for a particular time or purpose, endures during the whole lifetime of the

(*d*) Smith *v.* Milles, (1786) 1 T. R. at p. 480.

(*e*) Wankford *v.* Wankford, (1698) 1 Salk. 299, 301.

(*f*) Woolley *v.* Clark, *ubi sup.*

(*g*) Wankford *v.* Wankford, *ubi sup.*

(*h*) Sheppard's Touchstone, 474.

(*i*) Coswall *v.* Morgan, (1757) 2 Lee 571.

(*j*) In the Estate of George Shaw, [1905] P. 92 ; and see *post*, p. 159.

(*k*) *Re* Ratcliff, [1898] 2 Ch. 352. The Court could not under the Trustee Act, 1850, appoint a person to discharge duties which belonged only to the office of executor, and not to that of trustee : *Re* Willey, (1890) W. N. 1.

(*l*) See Appendix.

person to whom the grant is made, and cannot be repealed unless for a just cause (*m*).

Transmissibility of office.

Inasmuch as the power of an executor is founded on the special confidence and appointment of the deceased, in the case of a single or sole surviving executor, he is allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. The administrator on the other hand is merely the officer of the Court, and his power is not transmissible to his executor or administrator (*n*).

Liability.

The whole jurisdiction of Courts of Equity in the administration of assets is founded on the principle that it is the duty of the Court to enforce the execution of trusts, and that the executor or administrator who has the property in his hands is bound to apply that property in the payment of debts and legacies, and to apply the surplus according to the Will, or, in case of intestacy, according to the Statutes of Distribution (*o*). An executor or administrator is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (*p*). If he accepts the office he becomes a trustee in this sense (*q*). But an executor or administrator is not an express trustee, and the mere constructive trust by implication from his office will not prevent s. 8 of the Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57), from being a bar after twelve years to a suit to recover a legacy (*r*), or s. 13 of the Act 23 & 24 Vict. c. 38 from being a bar after twenty years to a suit to recover a share of an intestate's estate (*s*).

Not an express trustee.

Taking probate is acceptance of trust under Will.

Where personal property is bequeathed to the executors as trustees, the taking out probate of the Will is an acceptance

(*m*) See *post*, p. 160.

(*n*) 2 Bl. Com. 506; Williams (10th ed.) 180; and see *post*, pp. 55, 133.

(*o*) Adair *v.* Shaw, (1803) 1 Scho. & L. 262.

(*p*) Williams (10th ed.) 1609.

(*q*) *Re* Marsden, (1884) 26 C. D. 783, 789.

(*r*) *Re* Rowe, (1889) 58 L. J. Ch. 703; *Re* Jane Davis, [1891] 3 Ch. 119; Mackay *v.* Gould, [1906] 1 Ch. 25; Waddell *v.* Harshaw, [1905] 1 I. R. 416.

(*s*) *Re* Johnson, (1885) 29 C. D. 964; *Re* Lacy, [1899] 2 Ch. 149; Waddell *v.* Harshaw, *ubi sup.*

by them of all the trusts (*t*). But probate or letters of administration granted to the personal representative of a sole or last surviving trustee will not constitute such personal representative trustee of the settlement or Will creating the trust, unless he elects to act as trustee (*u*); but having elected to act he thereby becomes trustee for all purposes (*x*). The right of the legal personal representative to act as trustee does not, however, interfere with the right of the donee of a power to appoint new trustees to exercise that power; and directly that power is exercised the legal personal representative is displaced by the appointment and ousted for all purposes from the trust (*y*).

Moreover, although under s. 30 of the Conveyancing and Law of Property Act, 1881, real estate (not being copyhold) vested on any trust in any person solely, on his death becomes vested in his personal representative as if the same were a chattel real, yet this is simply for the purposes of devolution, and the section does not confer on the legal personal representative powers additional to those which the heir would have had (*z*).

By the Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 8, as respects trusts constituted after or created by instruments coming into operation after the 31st of December, 1881, and subject to any contrary direction in the instrument, until the appointment of new trustees, the personal representatives or representative for the time being of a sole trustee, or of the last surviving or continuing trustee, shall be capable of exercising or performing any power or trust which was given to, or capable of being exercised by, the sole or last surviving or continuing trustee. In this section "personal representative" means an executor (original or by representation) or administrator, but does

(*t*) Mucklow *v.* Fuller, (1821) Jac. 198.

(*u*) Legg *v.* Mackrell, (1860) 2 D. F. & J. 551; *Re* Benett, [1906] 1 Ch. 216.

(*x*) *Re* Waidanis, [1908] 1 Ch. 123; *Re* Howarth, [1909] W. N. 30.

(*y*) *Re* Routledge's Trusts, [1909] 1 Ch. 280.

(*z*) *Re* Crunden and Meux's Contract, [1909] 1 Ch. 690.

not include an executor who has renounced or has not proved. The section does not apply to land of copyhold or customary tenure.

Difficulty in determining when executor is *functus officio* and becomes trustee.

It is a common case that the same persons are executors and trustees, and under a Will so framed it may be difficult to determine when an executor ceases to have duties *quâ* executor: is *functus officio* and becomes trustee (*a*). There is, however, no authority for holding that merely because a debt was not called in for some time, the Court must imply, even after a lapse of twenty years and interest being paid in the meantime, that the debtor knew that the executors had ceased to be executors and had become trustees so as to necessitate a joint receipt by the trustees for the time being to give the debtor a good discharge. The persons with whom the executors are dealing are not bound to know the state of the testator's assets, and there may be good reasons why the receipt of one executor should suffice, and this rule prevails until the debtor is fixed with precise notice that the estate has been all administered (*b*). So also a purchaser from an executor must assume, in the absence of evidence to the contrary, even after twenty years have elapsed, that the sale is by the executor in that capacity and in due course of administration (*c*).

Assent.

An executor who by assenting to a disposition has divested himself of property cannot afterwards as executor make a title to a purchaser or pledgee thereof (*d*).

The subject of trusts apart from the office of executor or administrator is not within the scope of this work.

(*a*) *Re* Timmis, [1902] 1 Ch. 176; Solomon *v.* Attenborough, [1912] 1 Ch. 451, 458

(*b*) See per Ld. Hatherley, L.C., in Charlton *v.* Earl of Durham, (1869) L. R. 4 Ch. 433, 438; and *post*, p. 542.

(*c*) *Re* Whistler, (1887) 35 C. D. 561; and see *post*, pp. 235, 243.

(*d*) *Attenborough* v. *Solomon*, [1913] A. C. 76; and see *post*, pp. 243, 542.

CHAPTER I.

OF WILLS AND CODICILS.

SECT. 1.—*The general nature of and essentials to a Will or Codicil.*

INASMUCH as the executor derives his authority from the Will, the validity of the Will is the first matter for consideration.

Formerly appointment of executor was the foundation of the testament.

The naming or appointing of an executor in the time of Swinburne (1590) was said to be the foundation of the testament without which a Will was no proper testament, and in *Woodward* v. *Lord Darcy* (*a*) it was laid down by the common law judges that "without an executor a Will is null and void." But this strictness has long since ceased to exist. And even by the old authorities an instrument which would have amounted to a testament, if an executor had been appointed, was recognised as obligatory on him who had the administration of the goods of the deceased under the appellation of a codicil (*b*).

Will and codicil make together one testament.

A codicil in the sense it is now used, as an addition to or alteration of his Will made by a testator, is part of the Will, making together one testament (*c*), and the language of the Will may be interpreted by that of the codicil (*d*).

The Wills Act, 1837 (1 Vict. c. 26).

It will be sufficient, for the most part, for the purpose of this treatise (*e*), to commence with the Wills Act (1 Vict. c. 26), which repealed earlier statutes except as to Wills made before the 1st of January, 1838.

Sect. 3. Property which may be disposed of by Will.

Sect. 3 of the Wills Act enables "every person to devise, bequeath, or dispose of, by his Will executed in manner

(*a*) (1555) Plowd. 185.
(*b*) See Williams (10th ed.) 5.
(*c*) *Ibid.*
(*d*) Darley *v.* Martin, (1853) 13 C. B 683; *Re* Venn, [1904] 2 Ch. 52.
(*e*) As to the Origin of Wills, see Williams (10th ed.) 1 *et seq.*

hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death." This section in its general form is qualified in certain respects by other sections which will be referred to hereafter.

Although in feudal times, at common law, there was no power to dispose by Will of real estate, and the power to dispose of personal estate was restricted so as to reserve shares for the wife and children of the testator, yet now there is no restriction to the power of disposition, and a Will is not defective and cannot be set aside as being deficient in natural duty (*f*).

Sect. 9. Requisites to the validity of Will.

Sect. 9 provides " that no Will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned ; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary."

Sect. 11. Exception in favour of soldiers and mariners.

Before the Wills Act and by virtue of the exception contained in s. 23 of the Statute of Frauds (29 Car. II. c. 3) any soldier being in actual military service, or any mariner or seaman, being at sea, might dispose of his moveables, wages, and personal estate by Nuncupative Will, that is by declaration before a sufficient number of witnesses without any writing, or by a Will in writing without any solemnities. Sect. 11 of the Wills Act provides " that any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the making of this Act."

It follows that the appointment of executor and the disposition of personal estate may be made—

(1) By Will executed in manner required by the Wills Act, or

(*f*) The Wills Act, however, does not extend to Scotland, see s. 35.

(2) In the case of any soldier being in actual military service, or any mariner or seaman, being at sea, by Nuncupative Will, or by writing without any solemnities, as he might have done before the Statute of Frauds.

The words "in actual military service" do not apply to the Will of a soldier made while merely quartered in barracks either at home or in the colonies. A state of war must exist with which the soldier is, or may be, connected, and some step must have been taken by him towards joining the forces in the field (*g*).

Where a man has joined a vessel on service, and has commenced a voyage in it, his Will is within the exception in this Act, even though made on shore, or though the vessel at the time was laid up in harbour (*h*).

Sect. 11 of the Wills Act applies to merchant seamen as well as to seamen in the King's service (*i*).

A Will may be written in any language and either in ink or pencil (*k*); and, whether Will or codicil, it requires no special form of words (*l*).

Instrument may be testamentary regardless of form.

Whatever may be the form of the instrument duly executed in accordance with the Wills Act, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary (*m*). This rule applies notwithstanding the instrument may take the form of a deed (*n*).

There must be *animus testandi*.

But a document, though formally executed as a Will, will not operate as a legal Will if there was no *animus testandi*, as for instance if the document bears upon the face of it a positive assertion that it is not meant to operate as a legal

(*g*) In the Goods of Hiscock, [1901] P. 78; and see Williams (10th ed.) 19.

(*h*) In the Goods of M'Murdo, (1867) L. R. 1 P. & D. 540; and see Williams (10th ed.) 92.

(*i*) In the Goods of Parker, (1859) 2 Sw & Tr. 375.

(*k*) See Williams (10th ed.) 85.

(*l*) Oldroyd *v.* Harvey, [1907] P. 326.

(*m*) Cock *v.* Cooke, (1866) L. R. 1 P. & D. 241, 243; In the Goods of Coles, (1871) L. R. 2 P. & D. 362.

(*n*) In the Goods of Morgan, (1866) L. R. 1 P. & D. 214; Foundling Hospital *v.* Crane, [1911] 2 K. B. 367.

Will (*o*), or it is shown in evidence that it was written in jest, or without any intention of making an operative Will (*p*), or where two persons intending to execute codicils similar in form, by mistake each executed the codicil intended for the other (*q*).

Extrinsic evidence admissible to show intention.

Extrinsic evidence is admissible for the purpose of showing with what intention an ambiguous paper has been executed (*r*).

Revocability essential.

A Will is by its nature in all cases revocable, even though it is in terms expressed to be irrevocable. A Will is, therefore, said to be *ambulatory* until the death of the testator (*s*).

When contract to leave property by Will may be enforced specifically.

A contract to leave property by Will may be enforced by way of specific performance against all who claim under the deceased contractor as volunteers (*t*) ; but a contract to leave by Will on the part of one who was merely donee of a general testamentary power of appointment will not be specifically enforced (*u*), although damages are recoverable for the breach thereof (*v*) ; and such a contract on the part of the donee of a special testamentary power is void, and no remedy can be had upon it (*w*). A covenant not to exercise the power is not open to objection and operates as a release, and in so far as the whole or any part of the settled property is released from the power, it goes as unappointed and unaffected by the Will (*x*).

Mutual Wills.

Where two persons have made an arrangement as to the disposal of their property, and executed mutual Wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good ; and if the

(*o*) Ferguson Davie *v.* Ferguson Davie, (1890) 15 P. D. 109.

(*p*) Williams (10th ed.) 82, n. (*c*).

(*q*) In the Estate of Meyer, [1908] P. 353.

(*r*) In the Goods of Slinn, (1890) 15 P. D. 156.

(*s*) Williams (10th ed.) 7, 94.

(*t*) Synge *v.* Synge, [1894] 1 Q. B. 466, 470; and see Fry on Specific Performance, 4th ed., s. 245.

(*u*) *Re* Parkin, [1892] 3 Ch. 510, 517 ; *Re* Lawley, [1902] 2 Ch. 799 ; [1903] A. C. 411.

(*v*) *Re* Parkin, *ubi sup.*

(*w*) Palmer *v.* Locke, (1880) 15 C. D. 294, 301, per Brett, L.J. ; *Re* Bradshaw, [1902] 1 Ch. 436.

(*x*) *Re* Evered, [1910] 2 Ch. 147, 157.

survivor, after taking a benefit under the arrangement, alters his Will, his personal representative takes the property upon trust, to perform the contract, for the Will of the one who has died first has, by the death, become irrevocable. But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh Will, revoking the former one, the survivor, who has on the death of the other party to the arrangement notice of the alteration, cannot claim to have the later Will of the deceased set aside or modified, either by way of declaration of trust or otherwise (*y*). Nor, it would seem, could the Will of the survivor, whether he had notice or not of the alteration, be treated as impliedly revoked (*z*) ; so marriage will revoke the Will of one testator without impliedly revoking the Will of the other (*a*).

Conjoint Wills in one instrument.

The form of the Will being conjoint, that is, being made by two testators in one and the same instrument, cannot alter its revocable nature (*b*). On the first death of one of the testators, probate will be granted of so much of the instrument as then becomes operative (*c*).

Power to make a Will cannot be delegated ;

Although a testator may by Will delegate to another the power to select from a class and even to nominate executors (*d*), yet he cannot give someone else power to make a Will for him instead of making a Will for himself, and it is on this principle that vague directions are frequently held to be void for uncertainty (*e*).

nor power to revoke a Will.

And s. 20 of the Wills Act prevents a testator delegating his power to revoke his Will by inserting in it a clause conferring on another an authority to cancel or destroy it after his death (*f*).

Testator cannot prospectively make a Will

A testator cannot prospectively make a Will by reference to a paper to come into existence at a future time (*g*). Where

(*y*) Stone *v.* Hoskins, [1905] P. 194; and see Williams (10th ed.) 7.

(*z*) See s. 19 of Wills Act, *post*, p. 32.

(*a*) Hinckley *v.* Simmons, (1798) 4 Ves. 160.

(*b*) See Williams (10th ed.) 7.

(*c*) In the Goods of Piazzi-Smyth, [1898] P. 7.

(*d*) Williams (10th ed.) 171.

(*e*) Grimond (or Macintyre) *v.* Grimond, [1905] A. C. 124.

(*f*) Stockwell *v.* Ritherdon, (1848) Robert. 661.

(*g*) Croker *v.* Marquis of Hertford, (1844) 4 Moo. P. C. 339 ; In the Goods

by reference to papers to come into existence.

a Will refers to a paper, such paper cannot be incorporated in it unless it is clearly identified with the description of it given in the Will, and is shown to have been in existence at the time the Will was executed (*h*). The confirmation of a Will by codicil, making it speak from the date of the codicil, will incorporate into the Will an informal document referred to in the Will as existing, although it came into existence only after the execution of the Will, but before the execution of the codicil; but if the Will, treated as being re-executed by the codicil, still speaks in terms which show that it is referring to a future document, then there is no incorporation (*i*).

In order to admit parol evidence for the purpose of identifying a document referred to in a Will and intended to be incorporated, the description of the document in the Will must definitely refer to an existing document. If the Will can be construed as referring to an existing or future document, parol evidence is not admissible (*j*).

Sect. 2.—*Of Persons incapacitated to make a Will.*

Sect. 7 of Wills Act, 1837, invalidates Will of infant.

Infants.—Prior to the Wills Act, an infant, if adjudged competent, might make a valid Will of personal estate, a male at fourteen, a female at twelve years of age, but not at an earlier period (*k*). Sect. 7 of the Wills Act provides "that no Will made by any person under the age of twenty-one years shall be valid." But s. 11 of the same Act provides "that any soldier being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have done before the making of this Act." A Will therefore made since the Act by an infant soldier "in

Sect. 11 excepts infant soldier or seaman under certain circumstances.

of Adamson, (1875) L. R. 3 P. & D. 253, 255; and cf. *Re* Boyes, (1884) 26 C. D. 531, and *post*, p. 95, as to secret trusts.

(*h*) Singleton *v.* Tomlinson, (1878) 3 App. Cas. 404; University College of North Wales and University of Wales *v.* Taylor, [1907] P. 228, [1908] P. 140.

(*i*) In the Goods of Smart, [1902] P. 238, 241.

(*j*) University College of North Wales and University of Wales *v.* Taylor, *ubi sup.*; (C. A.) [1908] P. 140.

(*k*) Williams (10th ed.) 12.

actual military service " (*l*), or by an infant seaman " being at sea " (*m*), is valid.

Sect. 8, as to capacity of married woman.

Married Women.—Sect. 8 of the Wills Act provides " that no Will made by any married woman shall be valid, except such a Will as might have been made by a married woman before the passing of this Act."

At the passing of the Wills Act a married woman could dispose of property, real or personal, given or settled to her separate use, or over which she had been given a right to make a Will under a power of appointment ; otherwise she had no power whatever to devise land ; but as to personal property the husband surviving could waive his right to administration so as to give effect to a Will made by his wife during the coverture in derogation of his marital right (*n*). Such assent by the husband to his wife's Will of personalty might be given either during her life or after her death, but if he died before his wife the Will was void against her next-of-kin so far as it derived its effect from his assent. Moreover, the husband might revoke his consent at any time before probate, unless after her death he acted upon the Will or agreed to it (*o*).

Effect of husband's assent.

Property which could not pass under Will of married woman.

A Will made during coverture could not pass property acquired by the wife after her husband's death, or property acquired for her separate use after the date of her Will, for at the time of making the Will she was intestable as to such property ; and formerly where a Will was made by a married woman under a power, as the title of her executor did not extend beyond the property the subject of the power, the probate was limited accordingly (*p*).

Where under a settlement a married woman is given power " during coverture by Will to appoint," a Will made by her during coverture in exercise of the power is operative notwithstanding that she dies discovert, since in such case

(*l*) In the Goods of Hiscock, [1901] P. 78.

(*m*) *Re* McMurdo, (1867) L. R. 1 P. & D. 540.

(*n*) Noble *v.* Willock, (1873) L. R. 8 Ch. 778, 789.

(*o*) See Elliot *v.* North, [1901] 1 Ch. 424, and Williams (10th ed.) 40.

(*p*) Williams (10th ed.) 46.

the position of affairs at the date when the Will was executed is the material date (*q*).

Married woman sole executrix could transmit interest.

Since the husband had no beneficial interest in the personal estate which the wife took in the character of executrix, and as the law permitted her to take upon herself that office, it enabled her, even before the Married Women's Property Act, 1882, if sole executrix, to make a Will in this instance without the consent of her husband ; restricted, however, to what she was entitled to as executrix (*r*).

Effect of protection order.

By s. 21 of 20 & 21 Vict. c. 85, after a protection order, the wife shall, during the continuance thereof, be and be deemed to have been during the desertion in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under the Act if she obtained a decree of judicial separation (*s*).

Effect of judicial separation.

Sect. 25 of the same Act provides that as to property acquired by the wife from the date of the sentence of judicial separation, and whilst the separation shall continue, such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead.

21 & 22 Vict. c. 108, s. 7.

By s. 7 of 21 & 22 Vict. c. 108, the above provisions respecting the property of a wife who has obtained a decree for judicial separation or an order for protection were extended to property to which such wife had become or should become entitled as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (as the case might be) ; and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.

Effect of the Married

The Married Women's Property Act, 1870 (33 & 34 Vict.

(*q*) *Re* Illingworth, [1909] 2 Ch. 297.

(*r*) Williams (10th ed.) 40.

(*s*) The Will of a married woman who has obtained a protection order is valid although the order may not have been registered within ten days as provided by the above section. In the Goods of Farraday, (1862) 2 Sw & Tr. 369.

c. 93), extended the testamentary capacity of married women by declaring certain property referred to in the Act to be her separate property. But the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), confers expressly testamentary powers on married women.

Women's Property Acts: 33 & 34 Vict. c. 93.

45 & 46 Vict. c. 75.

Sect. 1 (sub-s. 1): "A married woman shall in accordance with the provisions of this Act"—(*i.e.*, in accordance with ss. 2 and 5 (*t*))—"be capable of acquiring, holding, and disposing by Will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee."

Sect. 1 (1).

Sect. 2: "Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sect. 2, as to woman married after 1st January, 1883.

Sect. 5: "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid."

Sect. 5, as to woman married before 1st January, 1883.

Sect. 23: "For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Since the Act of 1882 grant of probate of the Will of a

(*t*) *Re* Cuno, (1889) 43 C. D. 12.

married woman takes the form of an ordinary grant without any exception or limitation (*u*).

56 & 57 Vict. c. 63, s. 3, extends operation of Will of married woman to after-acquired property.

Sect. 3 of the amending Act of 1893 (56 & 57 Vict. c. 63) provides that "Sect. 24 of the Wills Act, 1837" (by which a Will shall be construed to speak from the death of the testator) "shall apply to the Will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such Will shall not require to be re-executed or republished after the death of her husband" (*v*).

Seamen and marines protected against improvident testamentary dispositions.

Seamen or marines of His Majesty's naval or marine force as defined by s. 2 of the statute 28 & 29 Vict. c. 72 are protected against certain testamentary acts. The proper result to be deduced from the cases on construction of the Acts is that when the relation of agent and seaman exists, there must be clear proof not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that wherever it is executed merely as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by Will, the instrument shall be valid (*w*).

Merchant seamen protected against improvident testamentary dispositions.

Merchant Seamen.—As regards merchant seamen, the Merchant Shipping Act, 1894, s. 177, provides as follows:—

"(1) Where a deceased seaman or apprentice has left a Will, the Board of Trade may refuse to pay or deliver the above-mentioned residue" [that is, the seaman's property after deducting expenses]:

"(*a*) If the Will was made on board ship, to any person claiming under the Will, unless the Will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship, and

(*u*) Probate Rules, 1887, rr. 15 and 18; and see *Re* Lambert, (1888) 39 C. D. 626.

(*v*) See *Re* James, [1910] 1 Ch. 157.

(*w*) Per Sir John Nicholl in Zacharias *v.* Collis, (1820) 3 Phillim. 202; and see Williams (10th ed.) 37.

"(*b*) If the Will was not made on board ship, to any person claiming under the Will, and not being related to the testator by blood or marriage, unless the Will is in writing, and is signed or acknowledged by the testator in the presence of, and is attested by, two witnesses, one of whom is a superintendent, or is a minister of religion officiating in the place in which the Will is made, or, where there are no such persons, a justice, British consular officer, or an officer of customs.

"(2) Whenever the Board of Trade refuse under this section to pay or deliver the residue to a person claiming under a Will the residue shall be dealt with as if no Will had been made."

Sect. 178 regulates the rights of creditors of deceased seamen and apprentices, claiming from the Board of Trade.

Sect. 742 defines the term "seaman" to include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.

The equity of these statutes cannot be extended beyond the Wills of mariners, so as to invalidate the Wills of other persons given to secure debts (*x*).

Idiots.

Idiots.—An idiot, that is, a fool or madman from his nativity who never has any lucid intervals, is incapable of making a Will (*y*).

Lunatics.

Lunatic.—A lunatic, that is, a person usually mad, but having intervals of reason, during the time of his insanity cannot make a testament, nor dispose of anything by Will. But a Will is not revoked by the subsequent insanity of the testator (*z*).

Sanity presumed,

Sanity will be presumed till the contrary is shown, but it is an inference merely from the absence of evidence to show the contrary. If a Will is produced before a jury and its

(*x*) Williams (10th ed.) 38; Florance *v.* Florance, (1755) 2 Lee 87.

(*y*) Williams (10th ed.) 12.

(*z*) Williams (10th ed.) 14.

execution proved, and no other evidence is offered, the jury would be properly told that they ought to find for the Will. And if the party opposing the Will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the Will. And in each case the presumption of competency would prevail. Still, the *onus probandi* lies, in every case, on the party relying on a Will, and he must satisfy the jury that it is the Will of a capable testator. And when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the Will is the Will of a competent testator, they ought not to affirm by their verdict that it is so (*a*). During a lucid interval a person afflicted with habitual insanity may make a valid Will, notwithstanding he has been found lunatic by inquisition (*b*), but the presumption and *onus* of proof are inverted, for the person who would take advantage of an interval of reason must prove it (*c*).

but *onus probandi* on party relying on Will.

Will made during lucid interval, presumption and *onus* of proof inverted.

Where a Will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to the Will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character, broadly taken, of his act (*d*).

Distinction between delirium and insanity in proof of lucid interval.

The probabilities, *à priori*, in favour of a lucid interval are infinitely stronger in a case of delirium than in one of permanent proper insanity (*e*).

Partial insanity.

Partial insanity, that is insanity upon a particular subject or as to a particular person, will invalidate a Will fairly presumable to have been made under its operation. But partial unsoundness, not affecting the general faculties, and not operating on the mind of the testator in regard to his

(*a*) Williams (10th ed.) 15.

(*b*) Williams (10th ed.) 25; and see *Re* Walker, [1905] 1 Ch. 160, 170, showing distinction between the execution of a deed and of a Will in this respect.

(*c*) Cartwright *v* Cartwright, (1793) 1 Phillim. 100; Williams (10th ed.) 16.

(*d*) Per Sir John Nicholl in Scruby *v.* Fordham, (1822) 1 Add. 90; and see Williams (10th ed.) 18 *et seq.*

(*e*) Williams (10th ed.) 21.

testamentary disposition, is not sufficient to render him incapable of disposing of his property by Will (*f*).

Nature of evidence to prove partial insanity.

To prove insanity as to a particular person, no course of harsh treatment—no sudden bursts of violence—no display of unkind or even unnatural feeling, merely, can avail ; it can only be proved by making out a case of antipathy clearly resolvable into mental perversion (*g*).

"If the human instincts and affections, or the moral sense, become perverted by mental disease ; if insane suspicion, or aversion, take the place of natural affection ; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a Will made under such circumstances ought not to stand" (*h*).

It affects whole Will and not merely particular disposition.

Where partial insanity is established the Will itself is null and void, and not merely a particular disposition (*i*).

Infirmity as distinguished from insanity.

Unsoundness of mind arising from want of intelligence occasioned by defective organisation, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, is equally a cause of incapacity. The inquiry in such cases simply is, whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done (*k*).

Standard of capacity in cases of infirmity.

The standard of capacity in cases of impaired mental power would seem to be the capacity on the part of the testator to comprehend the extent of his property, and the

(*f*) Banks *v.* Goodfellow, (1870) L. R. 5 Q. B. 549, where Cockburn, C.J., in delivering the judgment of the Court, reviewed the earlier authorities ; Boughton *v.* Knight, (1873) L. R. 3 P. & D. 64 ; Smee *v.* Smee, (1879) 5 P. D. 84 ; and Jenkins *v.* Morris, (1880) 14 C. D. 674.

(*g*) Dew *v.* Clark, (1822) 1 Add. 279 ; (1826) 3 Add. 79 ; Boughton *v.* Knight, *ubi sup.*

(*h*) Per Cockburn, C.J., in Banks *v.* Goodfellow, L. R. 5 Q. B. at p. 565.

(*i*) Cases above cited ; and see also Smith *v.* Tebbitt, (1867) L. R. 1 P. & D. 398, 435.

(*k*) Banks *v.* Goodfellow, *ubi sup.* at p. 566.

nature of the claims of others whom by his Will he is excluding from all participation in that property (*l*).

Mere weakness of understanding.

Mere weakness of understanding is no objection to a man disposing of his property by Will, for Courts cannot measure the size of people's understandings and capacities, nor examine into the wisdom or prudence of men disposing of their estates (*m*).

Deaf and dumb.

Deaf and Dumb Persons.—One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making a Will ; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means and has a desire to make one, then he may by signs and tokens declare his testament. One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then, in case he shall be able to write, he may with his own hand write his last Will and testament. But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i.e.*, if he have understanding he may make his testament by signs, otherwise not at all. Such as can speak and cannot hear, they may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise. Such as be speechless only, and not void of hearing, if they can write, may very well make their testaments themselves by writing ; if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present (*n*).

Blind persons.

Blind Persons.—As to blind persons it must be proved either that the Will was read over to the testator or that he was otherwise acquainted with its contents before he executed it (*o*).

(*l*) Harwood *v.* Baker, (1840) 3 Moo. P. C. 282, 290; Banks *v.* Goodfellow, *ubi sup.* at p. 569.

(*m*) Williams (10th ed.) 27.

(*n*) Williams (10th ed.) 12, 13.

(*o*) Fincham *v.* Edwards, (1842) 3 Curt. 63, on app. 4 Moo. P. C. 198

Similar evidence is necessary in the case of a person who cannot read as in the case of a blind person. There is no presumption that a person who executes a Will knows and approves of the contents thereof where by defect of education or by reason of illness he cannot read the Will (*p*). Illiterate persons.

Person drunk—" which is to be understood, when he is so excessively drunk, that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case " (*q*). Person drunk.

Duress (*r*).—It is for the Court to judge upon the consideration of the particular circumstances whether or not the testator could be supposed to have *liberum animum testandi* (*s*). It may arise either from force (*t*) or fear, but the fear must be such as that without it the testator had not made his testament at all, at least not in that manner (*u*). Duress.

Fraud and imposition upon weakness are sufficient grounds to set aside a Will (*x*). Fraud.

The Court may admit a part of an instrument to probate and refuse it as to the rest; as where a Will is void as to part obtained by undue influence or fraud, and good as to the rest (*y*).

Importunity, in order to invalidate the instrument, must be in such a degree as to take away from the testator free agency: so that the act is not the free act of a capable testator (*z*). Importunity.

Influence to invalidate a Will must be such a dominion acquired over the testator as to prevent the exercise of his discretion. It must amount to force and coercion destroying free agency. It must not be the influence Influence.

(*p*) Williams (10th ed.) 14.
(*q*) Swinburne, Pt. 2, s. 6.
(*r*) See Williams (10th ed.) 29 *et seq.*
(*s*) 2 Bl. Com. 497.
(*t*) Mountain *v.* Bennett, (1788) 1 Cox 355.
(*u*) Godolph., Pt. 3, c. 25, s. 8.
(*x*) Williams (10th ed.) 30.
(*y*) Trimleston *v.* D'Alton, (1827) 1 Dow. & Cl. 85; Allen *v.* McPherson, (1847) 1 H. L. C. 191, 209.
(*z*) Williams (10th ed.) 31.

of affection or attachment. It must not be the mere desire of gratifying the wishes of another. It is not unlawful for a man by honest intercession and persuasion or by fair and flattering speeches to procure a Will in favour of himself or another person (*a*). Influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a Will, must be an influence exercised either by coercion or fraud. It is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his Will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency ; a Will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed ; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any Will executed under false impressions thus kept alive. It is, however, difficult to state in the abstract what acts will constitute undue influence in questions of this nature (*b*). The undue influence must be an influence exercised in relation to the Will itself, but this may be inferred by the jury from circumstances relating to other matters or transactions (*c*).

The mere proof of the existence of the relation of parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, tutor and

(*a*) See Williams (10th ed.) 29, 30 ; also Parfitt *v.* Lawless, (1872) L. R. 2 P. & D. 462, 470.

(*b*) See per Ld. Cranworth in Boyse *v.* Rossborough, (1856) 6 H. L. C. 6, approved in Baudains *v.* Richardson, [1906] A. C. 169.

(*c*) *Ibid.*

pupil, does not raise a presumption of undue influence to vitiate a gift by Will (*d*).

Will written or prepared by person in his own favour.

With regard to a Will written or prepared by a party in his own favour. Such cases are decided by the rules laid down in *Barry* v. *Butlin* (*e*). "These rules are two; the first is, that the *onus probandi* lies upon the party propounding a Will, who must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator; the second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true Will of the deceased."

"The strict meaning of the term '*onus probandi*' is this: that if no evidence is given by the party on whom the burthen is cast, the issue must be found against him in all cases; this *onus* is imposed on the party propounding a Will; it is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed; and it cannot be that the simple fact of the party who prepared the Will being himself a legatee is, in every case and under all circumstances, to create a contrary presumption and to call upon the Court to pronounce against the Will unless additional evidence is produced to prove knowledge of its contents by the deceased."

Where the person making the Will in his own favour is the agent and attorney of the testator the suspicion is

(*d*) Parfitt *v.* Lawless, (1872) L. R. 2 P. & D. 462. Moreover the doctrine of equity as to confidential relationships does not necessarily apply at all to the relation of husband and wife; Howes *v.* Bishop, [1909] 2 K. B. 390; Bank of Montreal *v.* Stuart, [1911] A. C. 120; cf. *Re* Coomber, [1911] 1 Ch. 723, as to the nature of relation which will make Court set aside gift *inter vivos*.

(*e*) (1838) 2 Moo. P. C. 480; and see Darling *v.* Loveland, (1839) 2 Curt. 225, 227; Low *v.* Guthrie, [1909] A. C. 278; Williams (10th ed.) 86.

increased, and the conduct of a professional man in allowing the testator to remain in ignorance whereby he influenced the Will in favour of himself has been held fraudulent (*f*).

The rule in *Barry* v. *Butlin* extends to all cases where circumstances exist which excite the suspicion of the Court (*g*).

Undue influence, in the case of a gift by Will, must be proved affirmatively (*h*), and a plea of undue influence ought not to be put forward unless the party who pleads it has reasonable grounds upon which to support it (*i*).

Traitors and felons.

Traitors and felons forfeited to the King their goods and chattels on conviction. Lands were forfeited upon attainder which took place only on judgment of death or outlawry. There was no personal incapacity to make a Will in such cases, but the incapacity was occasioned by having no property to dispose of by reason of the forfeiture. If a man had goods as executor to another the same were not forfeited by conviction, and as to such goods he might make a Will (*k*).

Felo de se.

So also a *felo de se* had testamentary capacity, although he could not dispose by Will of goods and chattels, for they were forfeited by the act and manner of his death, but he might make a devise of his lands, for they were not subjected to any forfeiture (*l*).

Act to abolish forfeitures for treason and felony.

Outlawry.

Forfeiture or escheat for treason, felony, or *felo de se* was abolished by stat. 33 & 34 Vict. c. 23. Sect. 1 of this Act provided, however, that nothing in the Act should affect the law of forfeiture consequent upon outlawry ; but outlawry in any civil proceeding was abolished by 42 & 43 Vict. c. 59, s. 3.

Proceedings in outlawry in criminal matters are exceedingly rare, and may almost be said to be extinct, but judgment of outlawry in treason or felony amounts to a

(*f*) Williams (10th ed.) 86, n. (*x*), and cases cited.

(*g*) Tyrrell *v* Painton, [1894] P. 151, 157 (C. A.).

(*h*) Parfitt *v.* Lawless, *ubi sup.*

(*i*) Spiers *v.* English, [1907] P. 122, 124.

(*k*) Williams (10th ed.) 51.

(*l*) *Ibid.*

conviction and attainder for the offence (*m*), and outlawry in misdemeanour subjects the party to forfeiture of goods and chattels and all the profits of his real estate. The outlaw may, however, make a Will and appoint executors who may obtain a reversal of the outlawry if defective (*n*).

Sect. 3.—*Of the Signature of the Testator.*

Sect. 9 of the Wills Act provides that the Will "shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction."

What is sufficient signature.

The following are instances of sufficient signature.

(1) The making of a mark by the testator, although the name of the testator does not appear on the face of the instrument (*o*), or the testator is wrongly named in it (*p*), or the name against the mark is incorrectly stated (*q*), provided the identity is established.

(2) Stamping the Will, by way of signature, with an instrument on which the testator had had his usual signature engraved (*r*).

(3) Affixing to a Will a seal stamped with the testator's initials, who placed his finger on the impression made by the seal and said "this is my hand and seal" (*s*); but the mere putting of a seal by the testator is not sufficient (*t*).

(4) An assumed name, since it may be regarded as the mark of the testator (*u*).

(5) Signature of the testator's name by an attesting witness by the direction of the testator (*x*), or where the drawer of the Will signed in his own name and not in that of the testator (*y*); but the testator must, by act or word, in

(*m*) Archbold's Crim. Plead. (23rd ed.) (1905) 110.

(*n*) Chit. Cr. Law, (1826) vol. 1, p. 365.

(*o*) In the Goods of Bryce, (1839) 2 Curt. 325.

(*p*) In the Goods of Douce, (1862) 2 Sw. & Tr. 593.

(*q*) In the Goods of Clarke, (1858) 1 Sw. & Tr. 22.

(*r*) Jenkins *v.* Gaisford, (1863) 3 Sw. & Tr. 93.

(*s*) In the Goods of Emerson, (1882) 9 L. R. Ir. 443.

(*t*) Williams (10th ed.) 56.

(*u*) In the Goods of Redding, (1850) 2 Robert. 339.

(*x*) In the Goods of Bailey, (1838) 1 Curt. 914; Smith *v.* Harris, (1845) 1 Robert. 262.

(*y*) In the Goods of Clark, (1839) 2 Curt. 329.

some way indicate to the two witnesses present that the signature was put there at his request (*z*).

Sheets or papers of which Will consists need not be connected or all signed, but must all be in room at time of execution.

It is not necessary that all the papers of which a Will consists should be signed by the deceased, or connected together. Where a Will is found written on several sheets and the last only is signed and attested, although the witnesses did not observe the others, the *primâ facie* presumption is that they were in the room, and formed part of the Will at the time of the execution (*a*). It would seem, however, that the several sheets should be found together at the testator's death (*b*).

Position of signature.

Sect. 1 of the Wills Act Amendment Act, 1852 (15 Vict. c. 24), provides "that every Will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the Will that it shall be apparent on the face of the Will that the testator intended to give effect by such his signature to the writing signed as his Will, and that no such Will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the Will, or by the circumstance that a blank space shall intervene between the concluding word of the Will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the Will whereon no clause or paragraph or disposing part of the Will shall be written above the signature, or by

(*z*) In the Goods of Marshall, (1866) 13 L. T. 643.

(*a*) Gregory *v.* Queen's Proctor, (1846) 4 N. C. 620.

(*b*) Marsh *v.* Marsh, (1860) 1 Sw. & Tr. 528; Rees *v.* Rees, (1873) L. R. 3 P. & D. 84.

the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the Will is written to contain the signature : and the enumeration of the above circumstances shall not restrict the generality of the above enactment ; but no signature under the said Act or this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made " (*c*).

Where from the obvious sequence and sense of the context it appears to the satisfaction of the Court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamentary instrument will be entitled to probate (*d*).

In *Re Madden* (*e*), the Court, on the evidence, being of opinion that the sheet containing the signature and attestation clause was originally written last, and had been inadvertently misplaced, as found connected after the testator's death, granted probate on that footing.

Questions may still arise where the testator's signature is placed among the words of the testimonium clause, or the clause of attestation, without otherwise subscribing the Will, whether he intended it or not for his signature to the Will (*f*).

Sect. 4.—*Of the Attestation of Wills.*

The signature " shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the Will in the presence of the testator, but no form of attestation shall be necessary."

Whether the signature is made by the testator or by Acknowledgment of signature sufficient.

(*c*) Numerous decisions on this section are referred to in the notes in Williams (10th ed.) 57 *et seq.*

(*d*) In the Goods of Kimpton, (1864) 3 Sw. & Tr. 427.

(*e*) [1905] 2 I. R. 614.

(*f*) See Williams (10th ed.) 58, n. (*r*), and cases cited.

another for him, if it is acknowledged by the testator in the presence of two witnesses, the execution is good (*g*).

Signature must be visible to witnesses.

The witnesses must at the time of acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such is not the case it is immaterial that the signature is, in fact, there at the time of attestation or what the testator said (*h*).

The production of the Will with the testator's signature visibly apparent on the face of it, and a request by the testator to the witnesses to subscribe it, is sufficient acknowledgment by the testator of his signature (*i*).

Witnesses need not be informed of nature of instrument.

The testator need not inform the witnesses of the nature of the instrument they are attesting, and even if he deceives them and leads them to believe it is a deed, and not a Will, the execution is good notwithstanding (*k*).

Both witnesses must be present at same time :

The testator's signature must be made or acknowledged to the witnesses when both are actually present at the same time, and they must each also be conscious of the act ; since a person might be present in the room at the time without knowing, or having opportunity of seeing what was going on (*l*).

must attest in presence of testator :

They must attest and subscribe after the testator's signature has been made and acknowledged to them (*m*).

need not attest in presence of each other.

They must subscribe their names in the presence of the testator, but not necessarily in the presence of each other (*n*).

Testator must be in position to see attesting, if he chose.

It is not requisite that the testator should actually see the witnesses sign, or be in the same room. The test is whether the testator might have seen them if he had chosen to look, not whether he did see them sign (*o*).

(*g*) In the Goods of Regan, (1838) 1 Curt. 908.

(*h*) In the Goods of Gunstan, (1882) 7 P. D. 102.

(*i*) Williams (10th ed.) 65. For cases where the acknowledgment was held to be sufficient, see Williams (10th ed.) 66, n. (*u*), and where insufficient see Williams (10th ed.) 66, n. (*o*).

(*k*) Williams (10th ed.) 67.

(*l*) Brown *v.* Skirrow, [1902] P. 3.

(*m*) Moore *v.* King, (1842) 3 Curt. 243, 253 ; Wyatt *v.* Berry, [1893] P. 5.

(*n*) Williams (10th ed.) 68 ; and see per Gorell Barnes, J., in Brown *v.* Skirrow, *ubi sup.*, at p. 5.

(*o*) In the Goods of Trimmell, (1865) 11 Jur. N. S. 248 ; Carter *v.* Seaton, (1901) 85 L. T. 76.

If the testator was blind, it must appear that had he had his eyesight he could have seen the witnesses sign (*p*). So blind testator had he eyesight.

Where a Will appears to be duly executed, and there is a complete attestation clause, the presumption *omnia rite esse acta* applies, and where the attestation clause is incomplete, the presumption also applies, but with less force (*q*). Presumption *omnia rite esse acta.*

Affirmative proof of the due execution of the Will is not absolutely necessary, nor is it absolutely necessary, under all circumstances, that the witnesses should concur in stating what took place (*r*). The presumption will not be rebutted by the evidence of witnesses whose recollection of what took place is evidently defective or imperfect (*s*). And even where both the attesting witnesses profess to remember the transaction, and state facts which show that the Will was not duly executed, the Court may come to a conclusion from the facts and circumstances that their memory fails them ; and so the Will may be admitted to probate notwithstanding their testimony (*t*). To rebut presumption evidence must be clear.

To make a valid subscription and attestation to a Will there must be either the name of the witness or some mark intended to represent it (*u*). What is sufficient subscription.

One witness may guide the hand of the other (*x*), but one witness cannot subscribe for the other (*y*).

A witness need not sign his own name if the name actually subscribed by him be intended to represent his name, as where John Edmunds, clerk of the testator, by mistake subscribed " John Clerk, his clerk " (*z*). But there must be an intention to subscribe the Will by the witness, and a

(*p*) In the Goods of Piercy, (1845) 1 Robert. 278.

(*q*) Vinnicombe *v.* Butler, (1864) 3 Sw. & Tr. 580.

(*r*) Blake *v.* Knight, (1842) 3 Curt. 547, 561.

(*s*) Vinnicombe *v.* Butler, *ubi sup.* ; Wright *v.* Sanderson, (1884) 9 P. D. 149 ; Woodhouse *v.* Balfour, (1887) 13 P. D. 2 ; Daintree *v.* Fasulo, (1888) 13 P. D. 67, 102.

(*t*) Williams (10th ed.) 80, and cases cited.

(*u*) Hindmarsh *v.* Charlton, (1861) 8 H. L. C. 160.

(*x*) Harrison *v.* Elvin, (1842) 3 Q. B. 117.

(*y*) In the Goods of White, (1843) 2 N. C. 461.

(*z*) *Re* Oliver, (1854) 2 Spinks's Eccl. & Adm. 57.

subscription by a witness with the name of her husband (*a*), or by an imperfect signature, as by a Christian name only where the witness failing from infirmity to complete the signature abandoned the attempt (*b*), has been held insufficient. Where, however, a witness subscribed "servant to Mr. Sperling," without any name, it was held to be sufficient (*c*).

Subscription by mark is sufficient notwithstanding the witness may be able to write (*d*), and so a witness may subscribe by initials (*e*).

Position of attestation.

The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting (*f*).

The attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet (*g*), and the pieces of paper must be held or fastened together when the testator acknowledges in the presence of the witnesses his signature to the document as his Will (*h*).

If a Will is written on several or even separate sheets and the last alone is attested the whole Will is well executed provided the whole is in the room, and although a part may not have been seen by the witnesses. It may be presumed when the witnesses only saw the last sheet of the Will that the whole was in the room (*i*).

Sect. 5.—*Of Revocation of Wills.*

1 Vict. c. 26, s. 18, by marriage.

Sect. 18 of the Wills Act provides that "every Will made by a man or woman shall be revoked by his or her marriage

(*a*) In the Goods of Leverington, (1886) 11 P. D. 80.

(*b*) In the Goods of Maddock, (1874) L. R. 3 P. & D. 169.

(*c*) In the Goods of Sperling, (1863) 3 Sw. & Tr. 272.

(*d*) Williams (10th ed.) 70.

(*e*) In the Goods of Christian, (1849) 2 Robert. 110; In the Goods of Blewitt, (1880) 5 P. D. 116.

(*f*) In the Goods of Braddock, (1876) 1 P. D. 433; In the Goods of Fuller, [1892] P. 377.

(*g*) In the Goods of Braddock, *ubi sup.*; In the Goods of Hatton, (1881) 6 P. D. 204.

(*h*) Lewis *v.* Lewis, [1908] P. 1.

(*i*) Bond *v.* Seawell, (1765) 3 Burr. 1773; Williams (10th ed.) 73.

(except a Will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next-of-kin, under the Statute of Distributions)."

An invalid marriage, as for instance formerly a marriage with a deceased wife's sister, has not the effect of revoking a Will (*k*).

A Will disposing of a man's property generally and also exercising a power of appointment may be held good as to that part which exercises the power as being within the proviso although revoked as to the rest by the marriage of the testator (*l*).

Effect of marriage on Will made in exercise of a power.

Under this section a Will made in exercise of a power is only revoked by marriage when the property would pass in default of appointment to the heir, etc., of the testator as such either under the express wording of the limitation or trust in default of appointment contained in the settlement creating the power or under a resulting trust. Consequently marriage does not revoke a Will made in exercise of a power where the limitation or trust in default of appointment is not in express words to the appointor's heir, etc., notwithstanding that the persons who would take under the settlement in default of appointment are the same persons as would have taken the appointor's own property had he died intestate and in the same proportions (*m*).

So where the settlement under which the power is given provided that in default of appointment the trust fund should go to the person or persons who at the decease of the donee of the power should be his next-of-kin, a Will made in exercise of the power is not revoked by subsequent marriage, since the words next-of-kin, taken alone, do not imply the

(*k*) Mette *v.* Mette, (1859) 1 Sw. & Tr. 416.

(*l*) In the Goods of Russell, (1890) 15 P. D. 111.

(*m*) In the Goods of Fitzroy, (1858) 1 Sw. & Tr. 133; In the Goods of Fenwick, (1867) 1 P. & D. 319.

same class as the words next-of-kin under the Statute of Distributions (*n*).

Sect. 19. No revocation by presumption of intention arising from alteration in circumstances.

Sect. 19 provides that "no Will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

Before the Wills Act the marriage of a testator did not without birth of issue work an implied revocation, but if a woman made a Will and afterwards married, the marriage alone was a revocation of her Will (*o*).

Sect. 20. By subsequent Will, or writing executed like a Will, or destruction.

Sect. 20 provides that "no Will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid [*i.e.*, by marriage under s. 18], or by another Will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Sect. 21. Alterations in Will must be executed as a Will.

Sect. 21 provides that "no obliteration, interlineation, or other alteration made in any Will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the Will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will: but the Will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

What amounts to destruction.

It is not necessary to operate a revocation that the whole instrument should be destroyed; it is sufficient if the entirety or essence of the thing is destroyed, as for instance the

(*n*) In the Goods of McVicar, (1869) L. R. 1 P. & D. 671.

(*o*) As to implied revocations of Wills before the Wills Act, see Williams (10th ed.) 7, and earlier editions, Pt. I., Bk. II., Ch. III., s. 5.

excision or obliteration or scratching out as with a knife of the name of the testator, as being an essential part of the Will (*p*). So by parity of reasoning if the names of the attesting witnesses were taken away by the testator *animus revocandi*, it would be a good destruction of the Will under the Act (*q*).

Destruction of testator's signature.

Destruction of names of attesting witnesses.

Under s. 20 cutting is equivalent to tearing (*r*).

Cutting.

Cancellation by striking through with a pen is not a revocation under s. 20 of the Act, even though the striking through be done with the intention of revoking (*s*).

Cancellation by striking through, insufficient.

A symbolical burning, tearing, or destruction will not do ; there must be the act as well as the intention. All the destroying in the world without intention will not revoke a Will ; nor all the intention in the world without destroying : there must be the two (*t*).

Symbolical, insufficient.

If the act of destruction or cancellation be inchoate and incomplete it will not amount to a revocation (*u*). In *Doe* v. *Perkes* (*x*), the testator having torn the Will twice through, but before he had completed his purpose his arms were arrested by a bystander and he relented, the jury found that he had not done all he intended, and that he was prevented from completing the act of destruction, and the Court held there was no revocation of the Will.

Inchoate act of destruction, insufficient.

There must be the *animus* as well as the act ; both must concur in order to constitute a legal revocation (*y*). But there cannot be an intention to revoke what the testator believed was not a valid Will, and therefore the act of tearing a Will under the false impression that it was invalid was held ineffectual as a revocation (*z*). So where the testator imagined that the revocation had been already accomplished by a subsequent Will which was afterwards pronounced

There must be both *animus revocandi* and the act.

(*p*) Hobbs *v.* Knight, (1836) 1 Curt. 768 ; In the Goods of Morton, (1887) 12 P. D. 141.

(*q*) Hobbs *v.* Knight, *ubi sup.*

(*r*) Clarke *v.* Scripps, (1852) 2 Robert. 563.

(*s*) Cheese *v.* Lovejoy, (1877) 2 P. D. 251.

(*t*) Cheese *v.* Lovejoy, *ubi sup.*, per James, L.J.

(*u*) Williams (10th ed.) 104.

(*x*) (1820) 3 B. & Ald. 489.

(*y*) Clarke *v.* Scripps, *ubi sup.* at p. 567.

(*z*) Giles *v.* Warren, (1872) L. R. 2 P. & D. 401.

against, the act of tearing the first Will was held not to be a revocation, because the act of revocation had already been accomplished, and the act of destruction was not for the purpose of accomplishing it (*a*). And it would seem that the subsequent ratification by a testator of an unauthorised act of destruction effected in his presence by another would not amount to a revocation within the meaning of s. 20 (*b*).

Partial revocation.

It is the *animus* which governs the extent and measure of operation to be attributed to the act, and to determine whether the act shall affect the revocation of the whole instrument, or only of some and what portion thereof (*c*).

By obliteration.

Obliteration.—If it cannot be made out what the words originally were the obliteration is valid, and probate must then be granted as if there were blanks in the Will (*d*).

Words obliterated must not be "apparent."

The statute does not draw any distinction between modes of obliteration. The obliteration is to be valid and have effect "except so far as the words or effect of the Will before such alteration shall not be apparent." This means apparent on the face of the instrument itself, and does not mean capable of being made apparent by extrinsic evidence. Words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within the meaning of the section, if experts using magnifying glasses, when necessary, can decipher them and satisfy the Court that they have done so; but it is not allowable to resort to any physical interference with the document so as to render clearer what may have been written upon it. If a piece of paper has been pasted on a legacy as a means of obliteration the Court will not remove the pasted paper; but if the words under the paper can be read by an expert in writing, on placing a piece of brown paper round them and holding the document against a window pane, they are apparent within the meaning of the section. That is not to resort to

Magnifying glass may be used, but no physical interference with document.

(*a*) Clarkson *v.* Clarkson, (1862) 2 Sw. & Tr. 497.

(*b*) Mills *v.* Millward, (1889) 15 P. D. 20, per Butt, J.; Gill *v.* Gill, [1909] P. 157.

(*c*) Clarke *v.* Scripps, (1852) 2 Robert. 563.

(*d*) Williams (10th ed.) 107; In the Goods of James, (1858) 1 Sw. & Tr. 228.

artificial means at all (*e*). Where, however, a testatrix wrote something on the back of her first codicil, and at a later date pasted a piece of blank paper over it, the Court ordered the removal of the blank piece of paper in order to ascertain whether what had been written by the testatrix amounted to a revocation of the codicil (*f*).

Doctrine of dependent relative revocation.

Under the doctrine of dependent relative revocations, if the act of cancelling is done with reference to another act meant to be an effectual disposition, it will be a revocation or not, according as the relative act is efficacious or not (*g*). For instance, where a Will was altered in pencil and then cancelled only preparatory to the deceased making a new Will, which he was prevented by death, it was held there was no revocation (*h*). For although the testator does an act which unexplained would be one of revocation, yet if it appears that he did it only as a part of the means of setting up another Will, if that end is not accomplished the former Will is not revoked (*i*).

When principle applies Court may have recourse to any means to ascertain obliterated words.

Where the destruction or obliteration was intended to be dependent on the efficacy of a substituted disposition, as where a testator has so entirely erased the name of a legatee that it is no longer apparent, and has ineffectually substituted another name for it, or where the amount of a legacy has been obliterated or covered over, leaving the name of the legatee untouched, the principle of dependent relative revocation is applicable, and the Court may have recourse to any means of legal proof by which to ascertain the original disposition (*k*).

Cancellation under a mistake of law—as under a mistake that a second Will duly executed operated upon property contained in the first—is equally inoperative to revoke, as if made under a mistake of fact (*l*).

(*e*) Ffinch *v.* Coombe, [1894] P. 191.

(*f*) In the Goods of Gilbert, [1893] P. 183.

(*g*) Williams (10th ed.) 110.

(*h*) In the Goods of Applebee, (1828) 1 Hagg. 143.

(*i*) Dancer *v.* Crabb, (1873) L. R. 3 P. & D. 98, 104

(*k*) In the Goods of McCabe, (1873) L. R. 3 P. & D. 94; In the Goods of Horsford, (1874) L. R. 3 P. & D. 211.

(*l*) Perrott *v.* Perrott, (1811) 14 East, 423, 440.

Destruction of second Will does not revive first.

Having regard to s. 22 of the Wills Act (*m*), the destruction of a second Will, itself revoking one of prior date, cannot reinstate the first Will, even though it be in existence at the time of the testator's death.

Codicil not impliedly revoked by revocation of Will.

A codicil is, *primâ facie*, dependent on the Will, and before the passing of the Wills Act the principle was that a codicil fell to the ground with the Will when the Will was revoked, unless a contrary intention could be established (*n*). Since the Wills Act the principle would seem to be that a codicil will not be impliedly revoked merely by the destruction or revocation of the Will, for where a testamentary document is produced, and is proved to have been duly executed as such, it must be admitted to proof unless it has been revoked in one or other of the ways referred to in the statute (*o*).

Will executed in duplicate.

If a Will is executed in duplicate, and the testator keeps one part himself and deposits the other with some other person, and the testator mutilates or destroys the part in his own custody, it is a revocation of both. The presumption of law in such case, liable of course to be rebutted by evidence, is that the destruction or mutilation of the one duplicate was done *animo revocandi* as to both.

Presumption of law in case of destruction of one duplicate.

The same presumption holds, though in a weaker degree, where both the instruments are in the testator's possession.

And where the testator, having both duplicates in his possession, alters one, and then destroys that which he had altered, there also the same presumption holds, but still weaker (*p*).

Presumption as to mutilated Will found in testator's custody.

If a Will was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is presumed to have done the act *animo revocandi* (*q*).

Presumption as to Will not forthcoming.

If a Will traced to the possession of the deceased and last

(*m*) *Post*, p. 42.
(*n*) Williams (10th ed.) 113.
(*o*) Gardner *v.* Courthope, (1886) 12 P. D. 14.
(*p*) Pemberton *v.* Pemberton, (1807) 13 Ves. 290, 310.
(*q*) In the Goods of Lewis, (1858) 27 L. J. P. & M. 31.

seen there is not forthcoming on his death it is presumed to have been destroyed by himself (*r*).

Evidence rebutting presumption.

The presumption will be more or less strong according to the character of the custody which the testator had over the Will (*s*). It may be rebutted by declarations by the testator of good will towards the parties benefited by the Will, or of an adherence to the Will and the contents of the Will itself (*t*).

The presumption does not apply to a case where the testator became insane after the execution of the Will and continued insane until his death (*u*).

Will destroyed without authority.

If a Will duly executed is destroyed, either in the lifetime of the testator without his authority, or after his death, it may be established, upon satisfactory proof being given of its having been so destroyed, and also of its contents (*x*).

Declarations of testator as secondary evidence of contents of Will.

Probate of so much of contents as is proved.

Declarations, written or oral, made by a testator both before and after the execution of the Will, are, in the event of its loss, admissible as secondary evidence of its contents, and when the contents of a lost Will are not completely proved probate will be granted to the extent to which they are proved. There is not any difference in the principles of law applicable to the case of a lost Will and to those of any other lost document (*y*).

Declarations inadmissible to prove execution.

Declarations made by a testator after the date of an alleged Will are not admissible to prove the execution of the Will (*z*).

No presumption that subsequent Will revokes former.

Revocation by subsequent Will.—A subsequent Will is no revocation unless the contents of it are known ; and it is not to be presumed from the mere circumstance of another Will having been made that it revoked the former (*a*).

The subsequent Will must expressly or in effect revoke

(*r*) Welch *v.* Phillips, (1836) 1 Moo. P. C. 299.

(*s*) Sugden *v.* Lord St. Leonards, (1876) 1 P. D. 154, 200.

(*t*) *Ibid.*

(*u*) Sprigge *v.* Sprigge, (1868) L. R. 1 P. & D. 608.

(*x*) Williams (10th ed.) 117 ; Sugden *v.* Lord St. Leonards, *ubi sup.* ; Sly *v.* Sly, (1877) 2 P. D. 91.

(*y*) Sugden *v.* Lord St. Leonards, *ubi sup.* ; In the Goods of James Leigh, [1892] P. 82.

(*z*) Atkinson *v.* Morris, [1897] P. 40.

(*a*) Williams (10th ed.) 122.

the former, or the two must be incapable of standing together (*b*).

The words "last Will," or "last and only Will," do not import that the paper contained a different disposition of property and cannot be treated as an express revocation (*c*).

Where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will, not appearing, the evidence ought to be most clear and satisfactory, and if oral evidence alone be relied on, such evidence ought to be stringent and conclusive (*d*).

Two wholly inconsistent Wills of same date.

If there are two testamentary documents of the same date and it cannot be ascertained which of them was executed first, and their provisions are so inconsistent that they cannot stand together, the presumption in favour of admissibility to probate will be rebutted, and neither document will be admitted to probate, but the Court will endeavour to construe the documents to support the admissibility of both to probate (*e*).

Appointment of executors not conclusive of intention to constitute substantive Will.

In *Plenty* v. *West* (*f*) the judge remarked that the appointment of executors has always been considered to effect a complete disposition. But this is by no means conclusive of the testator's intention to constitute a substantive Will (*g*). Where a second Will appoints a fresh executor, if the Wills are not inconsistent, probate will be granted to both the executors (*h*). Where a second Will appoints no fresh executor, probate of both Wills may be granted to the executor named in the first Will (*i*). A second Will, disposing of the whole of the testator's property without the appointment of any executor, may operate as a total revocation of a prior Will, even though an executor may have been appointed by such prior Will (*k*), but only if the disposi-

(*b*) Williams (10th ed.) 120.

(*c*) Cutto *v.* Gilbert, (1854) 9 Moo. P. C. 131; Freeman *v.* Freeman, (1854) 5 De G. M. & G. 704.

(*d*) Cutto *v.* Gilbert, (1854) 9 Moo. P. C. 131, 140.

(*e*) Townsend *v.* Moore, [1905] P. 66.

(*f*) (1845) 1 Robert. 264, 269.

(*g*) Richards *v.* Queen's Proctor, (1854) 18 Jur. 540.

(*h*) In the Goods of Leese, (1862) 2 Sw. & Tr. 442; In the Goods of Morgan, (1867) L. R. 1 P. & D. 323.

(*i*) In the Goods of Griffith, (1872) L. R. 2 P. & D. 457.

(*k*) Henfrey *v.* Henfrey, (1840) 2

tions are so inconsistent that the papers cannot stand together (*l*).

Revocatory clause not conclusive.

A Will of a date prior to a Will or codicil with a revocatory clause, but not being a general clause of revocation, may be admitted to probate, if there is any part of it which the Court is satisfied that it was not the intention of the testator to revoke (*m*). But general words of revocation in a subsequent Will will even revoke a Will executing a special power (*n*).

A codicil which absolutely revokes and makes void all bequests and dispositions in a Will and nominates executors, but does not in direct terms revoke the appointment of executors and guardians in the Will, does not revoke the Will; for the legal operation of a codicil is to confirm such parts of the Will to which it refers as it does not revoke (*o*).

Implied revocation by later Will.

A later Will may revoke earlier testamentary documents although the earlier documents may have disposed of the whole estate of the deceased and although the last document contains no express clause of revocation and leaves the residue undisposed of (*p*).

The intention of the testator is the sole guide, and it is to be gathered from a consideration of the substance, and not merely the form, of the testamentary documents (*q*).

Parol evidence of intention admissible.

If, upon the face of a testamentary document and the facts known to the testator at the time of its execution, it is doubtful whether the testator intended altogether to revoke a former Will, the Court will admit parol evidence to ascertain the intention (*r*).

Distinction between Court of Construction and

In a Court of Construction, when the *factum* of the instrument has been previously established in the Court of

Curt. 468; 4 Moo. P. C. 27; Townsend *v.* Moore, [1905] P. 66, 78.

(*l*) O'Leary *v.* Douglass, (1878) 1 L. R. Ir. 45.

(*m*) In the Goods of Howard, (1869) L. R. 1 P. & D. 636; *Re* Wilcock [1898] 1 Ch. 95; and see *post*, p. 523.

(*n*) *Re* Kingdon, (1886) 32 C. D. 604; Cadell *v* Wilcocks, [1898] P. 21; see *post*, p. 42.

(*o*) In the Goods of Howard, *ubi sup.*

(*p*) Dempsey *v.* Lawson, (1877) 2 P. D. 98; In the Estate of Bryan, [1907] P. 125.

(*q*) *Ibid*

(*r*) Jenner *v.* Ffinch, (1879) 5 P. D. 106; In the Estate of Bryan, *ubi sup.*

Court of Probate as to admissibility of evidence of intention.

Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited; for the intentions of the deceased as to what instrument shall operate as, and compose, his or her Will are to be there collected from all the circumstances of the case taken together (*s*). But it was considered as a rule of the Prerogative Court that, in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, the ambiguity must be upon the face of the paper; and, further, the facts alleged and to be proved must completely remove that ambiguity. When no ambiguity whatever appears upon the face of the instrument the Court will not admit parol evidence (*t*).

Revocation of Wills of intermediate date by republication.

The republication of a Will will revoke any Will intermediate to the original date of the prior Will and the date of its republication (*u*).

Revocation of contingent Will by non-happening of condition.

Distinction where contingent event is merely motive for making Will.

A contingent Will is revoked by the not happening of the event on which it depends. The result of the cases appears to be that if the Will is made dependent on the contingency occurring its validity will depend on the happening of the contingent event, but that if the contemplated possible event is merely the reason of the making of the Will it will be valid and effectual in any event (*x*).

Evidence of adherence inadmissible.

Since the Wills Act it is clear no evidence of adherence can establish the Will where it is in its terms conditional, since the act of adherence cannot carry the case further than a parol declaration (*y*).

(*s*) Greenough *v.* Martin, (1824) 2 Add. 239, at p. 243; Chichester *v.* Quatrefages, [1895] P. 186. As to the admissibility of extrinsic evidence in aid of the interpretation of Wills, see *Re* Grainger, [1900] 2 Ch. 756, and S. C. Higgins *v.* Dawson, [1902] A. C. 1, 10.

(*t*) Williams (10th ed.) 257; and see *post*, p. 88.

(*u*) Williams (10th ed.) 147; as to the effect of republication of a Will by codicil, see *post*, p. 43.

(*x*) Williams (10th ed.) 134; for cases in which Wills have been held to be or not to be contingent, see Williams (10th ed.) 135, n. (*m*); and see also In the Goods of Spratt, [1897] P. 28; Halford *v.* Halford, [1897] P. 36; Edmondson *v.* Edmondson, (1901) 17 T. L. R. 397; In the Estate of Vines, [1910] P. 147.

(*y*) Williams (10th ed.) 136.

Probate before contingency happens.

If at the time of the death of the testator it is uncertain whether the condition on which the Will is to take effect will or will not happen, probate will, it would seem, be granted at once, though it will only determine what is to be done with the property in certain events (*z*).

Condition attaches to revocatory clause.

If the Will be conditional the condition will attach to the whole document, and therefore a revocation by it of all former Wills is subject to the happening of the contingency (*a*).

Contingent codicil.

But a contingent codicil, notwithstanding the condition fails, may operate as a republication of a Will or to set up an invalid Will, and on that ground will be entitled to probate (*b*).

Contingent presumptive revocation.

If a man by a subsequent Will or codicil make a disposition different from a former one, under a false impression, the impulse of which is the foundation of his wish to change his former intent, such an act will be considered only as affecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. And there seems to be no ground for any distinction between cases where the testator acts under a false impression originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him (*c*).

Distinction where testator expresses doubt or advice.

But there is a distinction between cases where the testator refers to a fact as having actually happened and where he merely expresses his doubt, supposition, or advice of the fact. In the latter case the subsequent disposition will operate as a complete revocation of the earlier disposition notwithstanding the expression of doubt, supposition, or advice (*d*). But if the subsequent disposition can be construed as being made conditional on the correctness of the supposition, as where the erroneous belief stated as the

(*z*) Williams (10th ed.) 137; In the Goods of Bangham, (1876) 1 P. D. 429.

(*a*) In the Goods of Hugo, (1877) 2 P. D. 73, 75.

(*b*) In the Goods of Da Silva, (1861) 2 Sw. & Tr. 315.

(*c*) Williams (10th ed.) 127, 128.

(*d*) Williams (10th ed.) 129.

motive for increasing certain legacies is as to the extent of the testator's property amounting to a specified sum, the second disposition will be inoperative (*e*).

Effect of later disposition failing owing to incapacity of legatee to take.

Where, however, the second disposition fails for want of capacity in the legatee to take, it would seem that the revocation would be effectual, since the first disposition being expressly revoked, although the legatee under the second disposition cannot take, the Court cannot speculate on whom the testator might have wished to confer the benefit in such an event (*f*).

Effect of general revocatory clause on appointment in prior Will.

A Will containing a clause revoking all former Wills will revoke an appointment made by an earlier Will, whether the power of appointment be special or general (*g*).

An appointment by Will under a general power will be revoked and the power executed by a later Will containing a residuary bequest and no reference to the power (*h*).

The execution of a limited power of appointment contained in an earlier Will will not be revoked by general words of bequest contained in a later Will (*i*).

A power of revocation is not a power of appointment, and consequently will not be exercised by general words of bequest (*k*).

Sect. 6.—*Of Republication of Wills.*

Sect. 22. By re-execution or codicil.

Sect. 22 of the Wills Act provides that "no Will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any Will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival

Revival not to extend to part revoked before revocation of whole.

(*e*) Thomas *v.* Howell, (1874) L. R. 18 Eq. 198

(*f*) Williams (10th ed.) 113; Tupper *v* Tupper, (1855) 1 Kay. & J. 665; Quinn *v.* Butler, (1868) L. R. 6 Eq. 225.

(*g*) *Re* Kingdon, (1886) 32 C. D. 604.

(*h*) Kent *v.* Kent, [1902] P. 108.

(*i*) Cadell *v.* Wilcocks, [1898] P. 21.

(*k*) Pomfret *v.* Perring, (1854) 5 D. M. & G. 775; *Re* Thursby's Settlement, [1910] 2 Ch. 181.

shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Codicil to revive Will must refer to it expressly or by inference.

A codicil has the effect of republishing the Will to which it refers as from the date of the codicil, so as to bring down the date of the Will to the date of the codicil (*l*). But reference to the Will is necessary. In order that republication may be implied, something must be found in the second testamentary instrument from which the inference can be drawn that, when making and executing it, the testator "considered the Will as his Will" (*m*).

The reference need not be by date, but there must be a sufficient identification in the reviving codicil of the Will intended to be revived (*n*).

Reference in codicil to a last Will.

Where a testator refers in a codicil to a last Will, and there is nothing in the contents of the codicil to point to any particular Will, it must be construed to refer to the Will in legal existence as the last Will and not to a revoked Will (*o*).

Error in date of reference.

Where a codicil, by mistake as to the date of a prior Will, refers to an earlier Will than that intended to be referred to, the codicil will not revive the earlier Will to which it refers, and the codicil may be admitted to probate together with the later Will (*p*). But where it is not a mere mistake of date, but the codicil makes reference to the provisions of the earlier Will, such earlier Will is confirmed and will revive; and as the later Will was not revoked by the codicil, all three documents must be admitted to probate (*q*).

Effect of confirming Will.

If a man ratifies and confirms his last Will, he ratifies and confirms it with every codicil that has been added to it (*r*). As every codicil is, in construction of law, a part of the

(*l*) *Re* Champion, [1893] 1 Ch. 101; *Re* Rayer, [1903] 1 Ch. 685.

(*m*) *Re* Smith, (1890) 45 C. D. 632.

(*n*) In the Goods of McCabe, (1862) 2 Sw. & Tr. 474, 478; Williams (10th ed.) 144, n. (*m*).

(*o*) Williams (10th ed.) 144; Hale *v.* Tokelove, (1850) 2 Robert. 318, 326.

(*p*) In the Goods of Ince, (1877) 2 P. D. 111.

(*q*) In the Goods of Stedham, (1881) 6 P. D. 205; In the Goods of Dyke, (1881) 6 P. D. 207.

(*r*) Crosbie *v.* MacDoual, (1799) 4 Ves. 610, 616.

Will, a testator by expressly referring to and confirming the Will will not be considered as intending to set it up against a codicil or codicils revoking it in part (*s*). Moreover a codicil reviving a revoked Will will not necessarily revive every codicil thereto. "On the one hand where a testator in a codicil uses the word 'Will' abstractedly from the context, it will refer to all antecedent testamentary dispositions which together make the Will of the testator, and consequently where a testator by a codicil confirms in general terms his Will or his last Will and testament, the Will, together with all codicils, is taken to be confirmed" . . . . "On the other hand, it is equally clear that the testator may by apt words express his intention to revoke any codicil already made, and to set up the original Will unaffected by any codicil" (*t*).

Codicil reviving revoked Will does not necessarily revive every codicil.

Effect of reference to Will by date merely.

The ratification of a Will described by its date is a ratification of the Will as modified by the codicils, and therefore does not revoke the codicils which were made between the date of the Will and the confirming codicil (*u*). But a reference to the Will by its date merely will not set up an inoperative codicil (*x*).

Codicil cannot revive Will not in existence.

A testator cannot by codicil revive a Will not only revoked but destroyed, since it has no existence (*y*).

Sect. 34. Revived Will to be deemed made at time when revived.

Sect. 34 of the Wills Act provides that "every Will re-executed or republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished or revived."

Incorporation by republication of unattested alterations and unexecuted papers.

A codicil duly executed will give effect and operation to unattested alterations in a Will; or to unexecuted papers which have been written between the periods of the execution of the Will and codicil, where the Will, if

(*s*) Williams (10th ed.) 147; In the Goods of De la Saussaye, (1873) L. R. 3 P. & D. 42.

(*t*) Per Fry, J., in Green *v.* Tribe, (1878) 9 C. D. 231, 234.

(*u*) Crosbie *v.* MacDoual, (1799) 4 Ves. 610; Green *v.* Tribe, *ubi sup.*, at p. 235.

(*x*) Green *v.* Tribe, *ubi sup.*, at p. 237.

(*y*) In the Goods of Steele, (1868) L. R. 1 P. & D. 575, 576; In the Goods of Reade, [1902] P. 75.

treated as executed on the date of the codicil and read as speaking at that date, contains language which would operate as an incorporation of the documents to which it refers (*z*).

(*z*) Williams (10th ed.) 154; In the Goods of Smart, [1902] P. 238, 241; *ante*, *p.* 12.

CHAPTER II.

OF THE APPOINTMENT OF EXECUTOR.

SECT. 1.—*Who is capable of being Executor.*

THE KING may be constituted executor ; in which case he appoints such persons as he shall think proper to officiate the execution of the Will, against whom such as have cause of action may bring their suits ; also the King may appoint others to take the accounts of such executors (*a*). King.

A corporation sole may be executor (*b*). Under the Public Trustee Act, 1906 (6 Edw. VII. c. 55), ss. 1 and 2, the Public Trustee is a corporation sole, under that name, and may be appointed executor either alone or jointly with others (*c*). Corporation sole.

A corporation aggregate may be appointed executor, and in that case the Court will grant letters of administration with the Will annexed to a person, styled a syndic, who has been duly appointed by the corporation to take the grant (*d*). Corporation aggregate.

In *In the Goods of Hunt* (*e*), where a limited company was appointed executor, the Court granted administration with the Will annexed to the general manager as the nominee of the company, and accepted the company as sole surety for the administrator under the administration bond.

There would be a practical difficulty in appointing a corporation aggregate to act jointly with an individual as executors, since a grant of letters of administration with the Will annexed would not be made so long as there existed a person able and willing to accept probate (*f*).

(*a*) Williams (10th ed.) 158.
(*b*) In the Goods of Haynes, (1842) 3 Curt. 75.
(*c*) See Appendix.
(*d*) In the Goods of Darke (1859) 1 Sw. & Tr. 516.
(*e*) [1896] P. 288.
(*f*) In the Goods of Martin, (1904) 90 L. T. 264.

Until the passing of the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), there was a difficulty in a natural person being a trustee jointly with a corporation, as a corporation and a natural person could not hold property as joint tenants, but only as tenants in common (*g*). This Act (s. 1) provides that a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual ; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would if the body corporate had been an individual have created a joint tenancy, they shall be entitled to the property as joint tenants. A limited liability company may be wound up and dissolved, but the Act of 1899 provides that where a body corporate is joint tenant of any property on its dissolution the property shall devolve on the other joint tenant.

A limited company can take and hold land without licence in mortmain under s. 16 of the Companies (Consolidation) Act, 1908 (substituted for s. 18 of the Companies Act, 1862).

On dissolution of a company under s. 195 of the Act of 1908 (substituted for ss. 142 and 143 of the Act of 1862), freehold and leasehold properties will revert to the grantor and do not vest in the Crown as *bona vacantia* (*h*).

Moreover, where the company was a trustee within the purview of ss. 26 and 35 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), after dissolution the Court may make a vesting order (*i*).

Partnership firm.

The appointment as executors of an ordinary partnership firm is considered to be an appointment not of the firm collectively, but of the persons composing it individually, Consequently the dissolution of the firm does not affect the appointment (*k*).

(*g*) *Re* Thompson's Settlement Trusts, [1905] 1 Ch. 229.

(*h*) Hastings Corporation *v.* Letton, [1908] 1 K. B 378, 387.

(*i*) *Re* General Accident Assurance Corporation, Ltd., [1904] 1 Ch. 147.

(*k*) In the Goods of Fernie, (1849) 6 N. C. 657.

Alien.

It would seem that an alien and even an alien enemy was always by our law capable of being executor (*l*).

Effect of Naturalization Act, 1870.

By the Naturalization Act, 1870 (33 Vict. c. 14), s. 2, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject.

Infant.

An infant may be appointed executor, and even a child *en ventre sa mère*. But if an infant is appointed sole executor, by stat. 38 Geo. III. c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration *cum testamento annexo* shall be granted to the guardian of such infant, or to such other person as the Court shall think fit, until such infant shall have attained the age of twenty-one years. This Act only applies in case of an infant being sole executor ; for if there are several executors, and one of them is of full age, no administration *durante minore ætate* ought to be granted, for he who is of full age may execute the Will (*m*).

Married woman.

Inasmuch as the wife could not do any act which might prejudice her husband without his consent, she could not formerly by our law take upon herself the office of executrix without his consent. So also before the Married Women's Property Act, 1882, a married woman could not take administration without the consent of her husband. And although the administration was always committed to the wife alone, yet the husband might during her life act in the administration, with or without her assent (*n*).

Effect of Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Now since January 1, 1883, by the Married Women's Property Act, 1882, s. 1 (2), a married woman is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract and of suing and being sued either in contract or tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be made a party to any action or other legal proceedings brought by or taken against her, and any damages

(*l*) Williams (7th ed.) 229.

(*m*) Williams (10th ed.) 159.

(*n*) As to the law before the Act, see Williams (10th ed.) 160, 360; Clough *v.* Bond, (1838) 3 My. & Cr. 490 ; Soady *v.* Turnbull, (1866) L. R. 1 Ch. 494.

or costs recovered against her in any action or proceeding shall be payable out of her separate property and not otherwise. And by s. 24 the word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, or executrix, or administratrix, either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration.

Husband not liable unless he intermeddles.

Since this Act it is not necessary that the husband should join in the administration bond (*o*).

Husband need not join in administration bond.

By s. 18 (read in connection with s. 6) of the Act a married woman who is an executrix or administratrix alone or jointly with any other person or persons may sue or be sued, and she was given power to transfer certain stocks, shares, and funds in that character without her husband, but this section was not exhaustive, and her husband's concurrence was still necessary in respect of properties not enumerated, and for the conveyance of the legal estate in real property (*p*), unless she happened to be a bare trustee (*q*). But now by the Married Women's Property Act, 1907 (*r*), a married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. The Act operates to render valid and confirm all such dispositions made after December 31, 1882, and before the commencement of the Act.

As executrix or administratrix she has power to dispose of real or personal property.

Persons attainted or outlawed.

Persons who formerly were attainted or outlawed were not disabled from being executors. They might sue as executors, because they sued in *autre droit* (*s*).

(*o*) In the Goods of Ayres, (1883) 8 P. D. 168.

(*p*) *Re* Harkness & Allsopp's Contract, [1896] 2 Ch. 358.

(*q*) *Re* Howgate & Osborn's Contract, [1902] 1 Ch. 451, 456.

(*r*) 7 Edw. VII. c. 18, s. 1.

(*s*) Williams (10th ed.) 161; and see *ante*, p. 24.

The Trustee Act, 1893, s. 48 (which replaces s. 46 of the Trustee Act, 1850 (13 & 14 Vict. c. 60)), provides that "property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), vest in any such administrator as may be appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee."

Under s. 50, the expression "trust" includes "the duties incident to the office of personal representative of a deceased person."

Sect. 25 (1) of the same Act enables the Court to make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt; but by sub-s. 3 "nothing in this section shall give power to appoint an executor or administrator." The Court can, however, under the Judicial Trustees Act, 1896, remove an executor and appoint a person to act in his place (*t*).

Poverty or insolvency no disqualification.

Before the Judicature Act, 1873, the Court could not refuse to grant probate to a person appointed executor, on account of his poverty or insolvency, and in consequence the Court of Chancery assumed the jurisdiction to restrain an insolvent or bankrupt executor (*u*). This jurisdiction will still be exercised in the case of a bankrupt executor, and unless there is another executor willing to act the Court will appoint a receiver (*x*), but the Court will not interfere merely because an executor is poor (*y*). Possibly now the Probate Court would refuse to grant probate in any case where the Chancery Division would interfere to restrain the executor if probate were granted to him, or where under

(*t*) *Ante*, p. 2.
(*u*) Williams (10th ed.) 162.
(*x*) Bowen *v.* Phillips, [1897] 1 Ch. 174.
(*y*) Howard *v.* Papera, (1815) 1 Madd. 142; Williams (10th ed.) 163.

the Judicial Trustee Act, 1896, the Court would appoint another person to act in his place (*z*).

Residence out of the United Kingdom.

Under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), where the executor at the time of the death of the testator shall be resident out of the United Kingdom, and it shall appear to the Court necessary or convenient by reason of the insolvency of the estate or other special circumstances, the Court may appoint some other person to be administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit.

Idiot or lunatic.

An idiot or lunatic is incapable of being executor or administrator by reason of his incapacity to accept the office or execute the trust (*a*).

Sect. 2.—*By what words Executor may be appointed.*

Appointment may be express, or constructive.

The appointment of executor may be either express or constructive. In the latter case he is usually called executor according to the tenor; for although no executor be expressly nominated in the Will by the word executor, yet, if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (*b*).

What is sufficient to constitute an executor according to the tenor.

In order to constitute a person an executor according to the tenor of a Will it must appear, on a reasonable construction thereof, that the testator intended that he should collect his assets, pay his debts and funeral expenses, and discharge the legacies contained in the Will (*c*). A direction to pay debts is not indispensable to the appointment of an executor according to the tenor; it is only one of many ways

(*z*) See Williams (10th ed.) 163, n. (*g*), and the observations of Sir J. Hannen in In the Goods of Gunn, (1884) 9 P. D. 242, 244.

(*a*) Williams (10th ed.) 164.

(*b*) *Ibid.* 165.

(*c*) In the Goods of Adamson, (1875) L. R. 3 P. & D. 253; In the Goods of Lowry, (1874) L. R. 3 P. & D. 157, 159; In the Goods of Lush, (1887) 13 P. D. 20.

by which the testator may show his intention that the person designated is to act as his executor (*d*).

And inasmuch as no one can assent to a legacy but he that has the management of the estate, a direction to a person to pay legacies constitutes him executor according to the tenor (*e*).

Gift to trustees for specific purpose insufficient.

But a gift to trustees for a specific purpose, with power only to pay what is vested in them as trustees to the particular persons for whose use they hold it, does not constitute them executors according to the tenor, as they have not a general power to receive and pay what is due to and from the estate, which is the office of an executor (*f*).

Direction to pay debts or funeral expenses out of a particular fund insufficient.

So a direction in a Will to a person to pay debts or funeral expenses not out of the general estate but out of a particular fund will not constitute him executor according to the tenor, and the mere fact of the testator saying that the sum of money out of which the debts and funeral expenses are to be paid was all the property he possessed is not sufficient to make it a payment out of the general estate (*g*).

Where there is a gift of the whole of the testator's property to trustees upon trust to sell and pay funeral expenses and debts and legacies, the gift will constitute them executors according to the tenor. But where, after giving legacies, the testator gave the residue of his property to trustees upon trust to sell and pay funeral and testamentary expenses and debts and other legacies, it was held that the residue was a particular fund and not the general estate, and therefore the trustees were not executors according to the tenor (*h*).

Words must show a duty generally to administer the estate.

Unless it can be gathered from the terms of the Will that the person named trustee therein is required to pay the

(*d*) *Re* J. M'Kane, (1887) 21 L. R. Ir. 1.

(*e*) Pickering *v.* Towers, (1757) 2 Lee, 401.

(*f*) Boddicott *v.* Dalzeel, (1756) 2 Lee, 294; In the Goods of Jones, (1861) 2 Sw. & Tr. 155; In the Goods of Fraser, (1870) L. R. 2 P. & D. 183; In the Goods of Punchard, (1872) L. R. 2 P. & D. 369; In the Goods of Lowry (1874), L. R. 3 P. & D. 157.

(*g*) In the Goods of Toomy, (1864) 3 Sw. & Tr. 562

(*h*) In the Goods of Love, (1881) 7 L. R. Ir. 178.

debts of the deceased, and generally to administer his estate, the Court will not grant probate to him as executor according to the tenor thereof (*i*).

Universal legatee merely, not entitled to probate as executor according to the tenor.

Where there is no person named executor, and a person is appointed universal legatee merely, without any directions, it is not the practice to decree probate to him as executor according to the tenor, but he is entitled to administration with the Will annexed (*k*).

Appointment of executor by necessary implication.

An executor may be appointed by necessary implication as "I will that A. B. be my executor if C. D. will not." So where a man by Will directed that none should have any dealings with his goods until his son came to the age of eighteen years except J. S., by this J. S. was held to be made executor during the minority of the testator's son. So also where a testator, supposing his brother to be dead, by his Will states: "Forasmuch as my brother is dead, I make A. B. my executor," if the brother be alive the brother shall be executor (*l*).

Office cannot be inferred by conjecture.

But the office of executor cannot be inferred by conjecture, as where a testator says: "If my son A. B. marry with C. D. let him not be my executor" (*m*).

Joint probate to executor according to the tenor and express executor.

An executor according to the tenor may be admitted to probate jointly with an executor expressly nominated (*n*).

So also an executor according to the tenor for limited purposes may be admitted to probate with an executor expressly nominated for general purposes (*o*).

Power given to nominate an executor.

A testator may by Will authorise legatees to nominate executors, and probate will be granted to persons nominated by those so authorised (*p*), and a person so authorised may nominate himself (*q*).

(*i*) In the Goods of Punchard, (1872) L. R. 2 P. & D. 369; In the Estate of Mackenzie, [1909] P. 305.

(*k*) In the Goods of Oliphant, (1851) 1 Sw. & Tr. 528; In the Goods of Pryse, [1904] P. 301.

(*l*) For other instances see Williams (10th ed.) 169.

(*m*) Godolphin, Pt. 3, c. 3, s. 5; and see In the Goods of Woods, (1868) L. R. 1 P. & D. 556.

(*n*) Grant *v.* Leslie, (1819) 3 Phillim. 116.

(*o*) Lynch *v.* Bellew, (1820) 3 Phillim. 424.

(*p*) In the Goods of Cringan, (1828) 1 Hagg. 548.

(*q*) In the Goods of Ryder, (1861) 2 Sw. & Tr. 127; but cf. *Re* Sampson, [1906] 1 Ch. 435.

So also a testator may empower the survivor of two executors nominated by his Will to appoint another to act with such survivor (*r*); or may direct his executors as such to appoint another to act with them, and if they cannot agree on the appointment they will be entitled to probate with a power reserved for the third person when appointed; but they cannot proceed to nominate until they have themselves obtained probate (*s*).

Executor of sole or last surviving executor.

As already stated (*t*), the executorship is transmissible to the executor of a sole or last surviving executor, and in such case no new grant of probate is required (*u*); and this principle seems to apply where the appointment is of "A during his life and on his death B," and A survived B.

Appointment bad for uncertainty.

An appointment of executors may be bad for uncertainty, as where the appointment is of "any two of my sons" (*x*), or "one of my sisters" (*y*).

Sect. 3.—*Appointment of Executors in several degrees.*

Appointment of executors in several degrees.

A testator may appoint several persons as executors in several degrees; as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on. In which case the wife is said to be instituted executor in the first degree, the son is said to be substituted in the second degree, the brother to be substituted in the third degree, and so on (*z*).

Substitute cannot propound until after citation

The substituted executor cannot propound the Will till the first-named executor has been cited to accept or refuse the office (*a*).

Acceptance of office excludes all substitutes.

If an instituted executor once accepts the office, and afterwards dies intestate, the substitutes in what degree soever are all excluded (*b*).

(*r*) In the Goods of Deichman, (1842) 3 Curt, 123.

(*s*) Jackson *v.* Paulet, (1851) 2 Robert. 344.

(*t*) *Ante*, p. 3.

(*u*) See *post*, p. 58.

(*x*) In the Goods of Baylis, (1862) 2 Sw. & Tr. 613.

(*y*) In the Goods of Blackwell, (1877) 2 P. D. 72.

(*z*) Williams (10th ed.) 171.

(*a*) Smith *v.* Crofts, (1758) 2 Lee, 557.

(*b*) Williams (10th ed.) 172.

It may be a question of construction whether the substitution was to take place only in the event of the first executor not acting at all, or in the case also of his death after having taken probate (*c*).

An appointment of A. as executor, and "in case of his absence on foreign duty" of B. as executrix, was held to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the Will arose, although he was in England at the time of the testator's death (*d*).

Sect. 4.—*How the appointment may be restricted.*

Appointment of executor may be absolute or qualified.

The appointment of an executor may be either absolute or qualified. It may be absolute when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time. It may be qualified by limitations as to the time, or place wherein, or the subject-matter whereon, the office is to be exercised; or the creation of the office may be conditional (*e*).

1. Limitation in point of time:

(a) in respect of commencement;

1. Limitation in point of time—(a) in respect of the commencement of the office, *e.g.*, an appointment of executor to have effect at the expiration of five years after the testator's death; or upon the death or marriage of a particular person, or upon a particular person coming to full age; or the testator may appoint the executor of A. to be his executor, and then if he die before A. he has no executor till A. die;—

(b) in respect of duration.

(b) in respect of the duration of the office, *e.g.*, during five years next after the testator's decease, or during the minority or widowhood or until the death or marriage of a person.

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand or after the period limited for its expiration on the other, the Court may commit administra-

(*c*) In the Goods of Lighton, (1828) 1 Hagg. 235; In the Goods of Johnson, (1858) 1 Sw. & Tr. 17; In the Goods of Foster, (1871) L. R. 2 P. & D. 304.

(*d*) In the Goods of Longford, (1867) L. R. 1 P. & D. 458.

(*e*) Williams (10th ed.) 175.

tion to another person until there be an executor, or after the executorship is ended (*f*).

2. Limitation in point of place—*e.g.*, the testator may appoint different persons executors for properties situate in different counties in England or in different parts of the world (*g*). 2. Limitation in point of place.

Where, however, a person is appointed executor for a place abroad he is not entitled to probate in this country (*h*), but where the testator has made two Wills with separate executors, one Will relating to property abroad and the other to property in England, probate should be granted here of the two documents as together constituting the Will of the deceased (*i*). Executor appointed for abroad only not entitled to probate here.

3. Limitation as to the subject-matter—*e.g.*, of particular property, such as of the testator's plate and household stuff, sheep or cattle, leases, etc. But where a testator, after giving specific legacies, but not disposing of the residue of his personal estate, appointed his daughter executrix for all property not named in the Will, the Court refused to grant probate to the daughter as executrix, on the ground that the Court cannot grant probate to an executor who is precluded from dealing with the property which passes under the Will (*k*). 3. Limitation as to subject-matter.

The same Will may contain the appointment of one executor for general and another for limited purposes (*l*); but s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), replacing s. 31 of the Conveyancing and Law of Property Act, 1881, does not enable a sole trustee of a Will to appoint by his Will special executors, for the purpose of executing, in continuation to himself, the trusts of the Will of the original testator (*m*).

(*f*) Williams (10th ed.) 176.

(*g*) *Re* Cohen's Executors and London County Council, [1902] 1 Ch. 187.

(*h*) Velho *v.* Leite, (1864) 3 Sw. & Tr. 456.

(*i*) In the Goods of Harris, (1870) L. R. 2 P. & D. 83.

(*k*) In the Goods of Wakeham, (1872) L. R. 2 P. & D. 395.

(*l*) Lynch *v.* Bellew, (1820) 3 Phillim. 424.

(*m*) *Re* Parker's Trusts, [1894] 1 Ch. 707.

Quoad creditors no distinction between general and limited appointment.

But although a testator may appoint separate executors of distinct parts of his property, and may divide their authority, yet *quoad* creditors, they are all to be considered as one executor, and may be sued as one executor (*n*).

4. Conditional.

4. The appointment may be conditional. The condition may be precedent, as for instance on the person nominated giving security to pay the legacies, or on his payment to the other executors of the debts which he owes the testator, or on his proving the Will within a certain time ; or the condition may be subsequent, as if the person nominated does some act on the happening of which the appointment is determined or another person is substituted (*o*).

Sect. 5.—*Of the transmissibility of the office of Executor.*

Executor of sole executor.

If there be a sole executor, whether originally so appointed, or becoming such by survivorship, who proves the Will, the executor of such executor is to all intents and purposes the executor and representative of the first testator.

Chain of representation continues until broken by intestacy.

First executor must have proved Will.

So long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator. But if the first executor should die without having proved the Will the executorship is not transmissible to his executor, but is wholly determined. Hence it follows that if the person appointed executor dies before the testator there must be administration *cum testamento annexo* (*p*).

Rule same though original probate limited.

The rule is the same, though the original probate was a limited one (*q*), but a limited probate formerly taken out to the Will of a married woman did not continue the chain of representation under the general probate of the Will of the original testator (*r*).

Effect of renunciation :

Since the stat. 20 & 21 Vict. c. 77, s. 79, where any person renounces probate, his right in respect of the executorship wholly ceases and the representation devolves as if he had

(*n*) Williams (10th ed.) 178.
(*o*) *Ibid.*
(*p*) Williams (10th ed.) 180 *et seq.*
(*q*) In the Goods of Beer, (1851) 2 Robert 349.
(*r*) In the Goods of Bayne, (1858) 1 Sw. & Tr. 132.

not been appointed executor (*s*); and 21 & 22 Vict. c. 95, s. 16, provides that whenever an executor survives the testator but dies without having taken probate, and whenever an executor is cited to take probate and does not appear to such citation, his right in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if he had not been appointed executor.

death before proving:

non-appearance to citation.

Consequently where an executor to whom power has been reserved survives his acting co-executor and does not appear to a citation the chain of executorship will be continued in the executors of the acting executor without any fresh grant from the Court (*t*).

Where chain of executorship continues no fresh grant required.

The administrator of an executor is merely an officer of the Court and has no privity or relation to the original testator. But the administrator *durante minori ætate* of the executor of an executor is the representative of the first testator; for such an administrator is *in loco executoris* (*u*). So also if administration *cum testamento annexo* has been granted under letter of attorney for the use or benefit of an executor it is the same thing as if the executor had proved the Will himself, and the chain of representation remains unbroken (*x*).

Administrator *durante minori ætate.*

Administrator *cum testamento annexo* as attorney.

Sect. 6.—*Of Renunciation or Acceptance of office.*

The executor named in the Will cannot be compelled to accept the office, even though in the lifetime of the testator he had agreed to accept the office (*y*). Moreover, the Public Trustee if appointed executor is in certain cases prohibited by statute from accepting the office (*z*).

Executor cannot be compelled to accept office.

By stat. 21 Hen. VIII. c. 5, s. 8, power was given to the

Executor may be cited

(*s*) *Post*, p. 62.

(*t*) In the Goods of Noddings, (1860) 2 Sw. & Tr. 15; In the Goods of Lorimer, (1862) 2 Sw. & Tr. 471, 473; In the Goods of Reed, [1896] P. 129.

(*u*) Williams (10th ed.) 181.

(*x*) Williams (10th ed.) 181; In the Goods of Murguia, (1884) 9 P. D. 236.

(*y*) Doyle *v.* Blake, (1804) 2 Scho. & Lef. 231, 239.

(*z*) 6 Edw. VII. c. 55, s. 2 (4). See Appendix.

to accept or refuse probate.

Ordinary to cite the executor to take or refuse probate, which power was transferred to the Court of Probate by s. 23 of the Court of Probate Act, 1857, and is now vested in the Probate Division of the High Court of Justice.

No action for neglect to take probate.

No action will lie for neglect to take out probate; the only remedy is by citing the executor in the Probate Division (*a*).

On non-appearance representation goes as if executor had not been appointed.

By stat. 21 & 22 Vict. c. 95, s. 16, whenever an executor named in a Will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator, and the administration of his effects, shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

After electing to accept executor cannot renounce:

If an executor once elects to accept the office he cannot afterwards renounce or refuse probate; and in spite of his renunciation, and the consequent appointment of an administrator, he will remain liable to be sued as executor both at law and in equity (*b*).

may retract invalid renunciation.

His renunciation, after intermeddling, being invalid, he will be allowed to retract it and prove the Will, and any appointment of an administrator will be revoked (*c*).

After intermeddling may be attached for not taking probate:

Where the executor has intermeddled and will not take upon himself probate of the Will, the Court will issue a citation calling upon him within a time limited to enter an appearance in the registry, and to take upon himself the probate and execution of the Will. In case of disobedience to the citation, the Court will make a peremptory order upon him to take probate within a specified time, and condemn him in the costs, and on failure to comply with the peremptory order the Court will on motion order a writ of attachment to issue to compel him to answer for his contempt (*d*).

(*a*) *Re* Stevens, [1898] 1 Ch. 162, 177, per Vaughan Williams, L.J.

(*b*) Williams (10th ed.) 200.

(*c*) In the Goods of Badenach, (1864) 3 Sw. & Tr. 465.

(*d*) Mordaunt *v.* Clarke, (1868) L. R. 1 P. & D. 592.

Moreover, stat. 55 Geo. III. c. 184, s. 37, enacts that "if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the Will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds, and also a further sum at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the Will or letters of administration of the estate and effects of the deceased." also liable to penalties.

The penalty is now one hundred pounds or double the amount of duty chargeable according as the Commissioners elect, which is a debt due to the Crown, and is recoverable by any of the ways or means in force for the recovery of probate, legacy, or succession duty (*e*).

Whatever acts will make a man liable as executor *de son tort* will be deemed an election of the executorship. Moreover, whatever shows an intention to take upon himself the executorship will be sufficient (*f*). A statement by him in answer to an inquiry by a creditor, that he is an executor, and that the Will has been proved, will render him liable as an executor (*g*). What will be deemed an election to accept office.

Taking the oath as executor is not to be considered as an intermeddling such as to preclude renunciation (*h*), but an executor cannot renounce after he has taken probate (*i*). Oath as executor does not preclude renunciation.

The present practice is that the executor intending to Practice as to renouncing.

(*e*) See 44 Vict. c. 12, s. 40; 57 & 58 Vict. c. 30, s. 8 (1), (5), (6); Att-Gen. *v.* New York Breweries Co., [1898] 1 Q. B. 205; [1899] A. C. 62.

(*f*) Long *v.* Symes, (1832) 3 Hagg. 774.

(*g*) Vickers *v.* Bell, (1864) 10 Jur. N. S. 376.

(*h*) McDonnell *v.* Prendergast, (1830) 3 Hagg. 216; Long *v.* Symes, (1832) 3 Hagg. 774; Jackson *v.* Whitehead, (1821) 3 Phillim. 577; Mohamidu *v.* Pitchey, [1894] A. C. 437, 443.

(*i*) In the Goods of Veiga, (1862) 32 L. J. P. M. & A. 9.

renounce signs the common form of renunciation in the presence of a witness (*k*), and the form is then filed in the registry of the Probate Division. It need not be under seal, but if sealed it is liable to 10*s*. stamp duty (*l*). A renunciation does not exist as an effective instrument until it has been recorded, and until it is filed it may be withdrawn (*m*).

Until filed renunciation can be withdrawn.

Where the executor is out of England an authority to renounce by power of attorney may suffice (*n*).

Executor cannot in part renounce.

An executor cannot in part refuse. He must refuse entirely or not at all, even in the case of his testator being executor to another person (*o*).

After renunciation rights as executor wholly cease.

Under 20 & 21 Vict. c. 77, s. 79, after renunciation the rights of executorship wholly cease, and the representation of the testator and the administration of his effects shall and may go, devolve, and be committed in like manner as if the person renouncing had not been appointed executor.

When Court will allow retraction of renunciation.

Under the old law, where all the executors of a Will renounced, and administration had been granted, the renunciation could not be retracted, but where some executors proved and others renounced, those who had renounced were allowed to retract, as they could then be let in without altering the devolution of the representation. The old practice is not abrogated by the above Act, and where one of two executors absconded after taking probate the Court allowed his co-executor who had renounced to retract his renunciation and take probate (*p*). The retraction will not be allowed unless it can be shown that it will be for the benefit of the estate or of those interested under the Will (*q*).

A person cannot renounce probate and take administration in another character.

By rule 50, P. R. (Non-Contentious business), "no person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one

(*k*) Form No. 247, Tr. & Coo. P. P. (14th ed.), p. 895.

(*l*) Tr. & Coo. P. P. (14th ed.) p. 202.

(*m*) Williams (10th ed.) 204; In the Goods of Morant, (1873) L. R. 3 P. & D. 151.

(*n*) In the Goods of Rosser, (1864) 3 Sw. & Tr. 490.

(*o*) Williams (10th ed.) 204; Brooke *v.* Haymes, (1868) L. R. 6 Eq. 25, 30.

(*p*) In the Goods of Stiles, [1898] P. 12.

(*q*) In the Goods of Gill, (1873) L. R. 3 P. & D. 113.

character is to be allowed to take a representation to the deceased in another character." But this rule is merely for the guidance of the registry, and is capable of modification by the Court on sufficient reason being shown (*r*).

(*r*) In the Goods of Loftus, (1864) 3 Sw. & Tr. 307; In the Estate of Toscani, [1912] P. 1.

CHAPTER III.

OF AN EXECUTOR "DE SON TORT."

What constitutes an executor *de son tort.*

If one who is neither executor nor administrator intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or more usually an executor *de son tort* (*a*).

Liability of an executor *de son tort.*

When a man has so acted as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, or by a legatee (*b*).

Read's case.

The following points were resolved in *Read's* case (*c*) :—

Intermeddling must be before rightful executor has taken office, or before grant of administration.

1. "When no one takes upon him to be executor, nor any hath taken letters of administration, there the using of the goods of the deceased by any one, or the taking of them into his possession, which is the office of an executor or administrator, is a good administration to charge them as executors of their wrong; for those to whom the deceased was indebted in such case have not any other against whom they can have an action for recovery of their debts."

Goods taken out of possession of rightful executor are assets in his hands.

2. "When an executor is made, and he proves the Will, or takes upon him the charge of the Will, and administers in that case, if a stranger takes any of the goods, and, claiming them for his proper goods, uses and disposes of them as his own goods, that doth not make him in construction of law an executor of his wrong, because there is another executor of right to whom he may charge, and these goods which are in such case taken out of his possession after that he hath administered, are assets in his hands; but although there be

(*a*) Williams (10th ed.) 183.
(*b*) Williams (10th ed.) 190.
(*c*) (1600) 5 Rep. 33 b.

Yet stranger expressly claiming to act as executor may be charged as executor *de son tort.*

an executor who administers, yet if the stranger takes the goods, and claiming to be executor, pays debts, and receives debts, or pays legacies and intermeddles as executor, there, for such express administration as executor, he may be charged as executor of his own wrong, although there be another executor of right."

As to goods taken by stranger before executor has taken office.

3. "In the case at bar, when the defendant takes the goods before the rightful executor hath taken upon him, or proved the Will, in this case he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which cometh to his hands after he takes upon him the charge of the Will."

Taking possession of foreign assets only not sufficient.

Taking possession of foreign assets without taking possession of any of the English assets will not constitute a person executor *de son tort* (*d*).

What acts constitute executor *de son tort* is question of law.

The question of fact whether the person charged as executor *de son tort* took possession of effects of the deceased and acted or intermeddled is for the jury; but when the facts are established, the result from them—whether they constitute an executor *de son tort*—is a matter of law for the judge to decide (*e*).

Acts of kindness or charity.

Although the slightest circumstance of intermeddling will make a person executor *de son tort* (*f*), yet there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, directing the funeral in a manner suitable to the estate which is left and defraying the expenses of such funeral himself or out of the deceased's effects, making an inventory of his property, feeding his cattle, repairing his houses, or providing necessaries for his children; for these are offices merely of kindness and charity (*g*).

Paying debts or testamentary expenses of deceased.

A man who pays the debts of the deceased, or the fees about proving his Will, with his own money does not thereby constitute himself executor *de son tort* (*h*).

(*d*) Beavan *v.* Lord Hastings, (1856) 2 K. & J. 724.

(*e*) Padget *v.* Priest, (1787) 2 T. R. 97.

(*f*) Williams (10th ed.) 183; and see per Buller, J., in Padget *v.* Priest, *ubi sup.*

(*g*) Williams (10th ed.) 187.

(*h*) Williams (10th ed.) 185.

So the giving by the widow of the deceased of a promissory note for the amount of a debt which was owing from the deceased was held not to constitute the widow executrix *de son tort* (*i*).

A solitary act of wrong, without proof of acting as executor, is not sufficient.

A single act of wrong, without proof of acting at the time in the character of executor, is insufficient, as for instance the return of goods sold to the intestate but not paid for on the application of the vendor to the widow of the deceased in satisfaction of his demand (*k*), or taking or retaining possession of the goods of the deceased under a claim of title (*l*) or under a mistake as to the ownership (*m*).

Nor purchasing or acquiring goods from an executor *de son tort*.

So if a man takes the goods of the deceased and sells or hands them to another, this shall charge the former but not the latter as executor *de son tort*, in the absence of collusion, although the latter acted knowingly (*n*).

Nor obtaining payment or satisfaction of a debt from an executor *de son tort*.

So also a creditor who obtains payment of his debt from an executor *de son tort*, or takes over from him assets of the deceased at a valuation in satisfaction of his debt, does not thereby become executor *de son tort* (*o*).

Agent of executor continuing to act after death of his principal.

So long as there is an executor living who has acted, whether he has proved the Will or not, a person dealing with the goods of the testator as agent of the executor cannot be treated as an executor *de son tort*, but if he continue to act after the death of the sole or last surviving executor he may be so charged (*p*).

Agent of person intending to take administration but dying before doing so.

If a person intending to take out administration employs an agent to collect the debts or sell the goods of the deceased, and he does so, and the principal dies before taking out administration, they are both executors *de son tort*. The doctrine that the possession of an agent is the possession of a principal has no application to the case of a wrong-doer (*q*).

(*i*) Serle *v.* Wentworth, (1838) 4 M. & W. 9.

(*k*) Mountford *v.* Gibson, (1804) 4 East, 441.

(*l*) Femings *v.* Jarrat, (1795) 1 Esp. N. P. C. 336.

(*m*) Williams (10th ed.) 189.

(*n*) Williams (10th ed.) 188; Paull *v.* Simpson, (1846) 9 Q. B. 365; and see Hill *v.* Curtis, (1865) L. R. 1 Eq. 90.

(*o*) Hursell *v.* Bird, (1892) 65 L. T. 709.

(*p*) Hall *v.* Elliott, (1791) Peake N. P. C. 119; Sykes *v.* Sykes, (1870) L. R. 5 C. P. 113.

(*q*) Sharland *v.* Mildon, (1846) 5

Effect of grant of administration to executor *de son tort.*

After administration has been committed to an executor *de son tort* he may still be charged as executor *de son tort* for the goods previously administered by him (*r*). The relation back of letters of administration exists only for the benefit of the estate by enabling the administrator to recover against those who interfere with it (*s*).

Effect of 43 Eliz. c. 8 in procuring grant of administration to person of mean estate to defraud creditors.

Under the stat. 43 Eliz. c. 8, a person who procures administration to be granted to a stranger of mean estate and not of kin to the intestate in order by deed of gift or letter of attorney to obtain the estate of the intestate into his own hands to the defrauding of creditors is constituted executor *de son tort* to the extent of any goods so obtained, or any debt released or discharged, without valuable consideration of the value of the same goods or debt or near thereabout (*t*).

Extent to which executor *de son tort* will be protected.

May plead *plene administravit.*

Though an executor *de son tort* cannot by his own wrongful act acquire any benefit, yet he is protected in all acts, not for his own benefit, which a rightful executor may do. And accordingly, if he pleads properly, he cannot be made liable beyond the extent of the goods which he has administered, and therefore under a plea of *plene administravit* he shall not be charged beyond the assets come to his hands, and in support of the plea he may give in evidence payments by himself of debts of the deceased of equal or superior degrees and even after action brought he may dispose of the assets in discharging a debt of higher degree (*u*).

Delivery of assets to rightful representative before action.

An executor *de son tort* can get his discharge from the rightful executor or administrator before action brought, but he cannot discharge himself from the debt of a creditor by delivering over the assets to the rightful executor or administrator after action brought, because the creditor would be in a worse position ; he would have to bring a second action against the rightful executor or administrator (*x*).

Hare, 469 ; Hill *v.* Curtis, (1865) L. R. 1 Eq. 90, 100.

(*r*) Laury *v.* Aldred, (1612) 2 Brownl. 185.

(*s*) Morgan *v.* Thomas, (1853) 17 Jur. 283 ; and see *post*, p. 219.

(*t*) See Coote *v.* Whittington, (1873) L. R. 16 Eq. 534, 544.

(*u*) Williams (10th ed.) 191, 192 ; Oxenham *v.* Clapp, (1831) 2 B. & Ad. 309.

(*x*) Oxenham *v.* Clapp, *ubi sup.* 314; Hill *v.* Curtis, *ubi sup.*

The rule in equity is the same ; so that if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to an action against him for an account (*y*).

May prove settled account with rightful representative before action.

Although an executor *de son tort* is liable at the suit of a creditor to an account in equity for such assets as it is alleged he has received, he is not liable to a general account unless he has received everything (*z*).

Not liable to general account unless he has received everything.

In an action for a debt of the testator the lawful executor may be joined in the action against the executor *de son tort*, or they may be sued severally, but a lawful administrator cannot be so joined (*a*).

Lawful executor may be sued jointly with executor *de son tort : secus*, administrator.

An executor *de son tort* cannot retain for his own debt (*b*), though he be a creditor of a higher degree (*c*). Formerly if afterwards, even *pendente lite*, he obtained administration, he might retain (*d*), but now he is prevented from so doing by the form of bond (*e*).

He cannot retain for his own debt.

If the rightful executor or administrator bring an action of trover or trespass against the executor *de son tort*, the latter may give in evidence in mitigation of damages payments made by him in the rightful course of administration (*f*). But this recouping in damages can only be allowed to the executor *de son tort* in cases where there are sufficient assets to satisfy all the debts of the deceased ; for otherwise the rightful executor or administrator would be precluded not only from giving preference to one creditor over others of equal degree, which is one of the privileges of his office, but also from satisfying his own debt in priority to all those of equal degree by way of retainer (*g*).

Against rightful representative he may give in evidence payments in due course of administration ; but only if assets sufficient to satisfy all debts.

Where the executor *de son tort* is really acting as executor in the due course of administration, and the party with whom he deals has fair reason for supposing that he has authority

Transactions in good faith.

(*y*) Hill *v.* Curtis, (1865) L. R. 1 Eq. 90.

(*z*) Coote *v.* Whittington, (1873) L. R. 16 Eq. 534.

(*a*) Williams (10th ed.) 191.

(*b*) Coulter's Case, (1599) 5 Co. 30 a ; and see Oxenham *v.* Clapp, (1831) 2 B. & Ad. 309, 313.

(*c*) Curtis *v.* Vernon, (1790) 3 T. R. 587.

(*d*) Williams (10th ed.) 193.

(*e*) See *post*, p. 377

(*f*) See *post*, p. 163.

(*g*) Williams (10th ed.) 195.

to act as such, his acts shall bind the rightful executor and shall alter the property (*h*).

May plead Statute of Limitations.

An executor *de son tort* is entitled to plead the Statute of Limitations (*i*).

Cannot be compelled to take grant of administration.

Although an executor after an act of administration cannot refuse to accept the executorship and take probate, yet an executor *de son tort* cannot be compelled to take a grant of letters of administration (*k*).

Liability of his executor on original contracts.

The executor of an executor *de son tort* is not liable for a breach of contract committed by the person with whose property the executor *de son tort* has intermeddled (*l*).

Liability of infant.

It has been held that an infant cannot be made liable to account where he has acted as administrator under an improper grant to him (*m*), nor where being appointed executor he has acted but never proved the Will on coming of age (*n*); but where a breach of trust has been committed by an infant connected with his proceedings as to the estate, an inquiry should be directed as to all the circumstances, since there may be circumstances under which he might be made liable for moneys received by him, though received before he came of age (*o*).

(*h*) Thompson *v.* Harding, (1853) 18 Jur. 58; see *post*, p. 163.

(*i*) Webster *v.* Webster, (1804) 10 Ves. 93; Doyle *v.* Foley, [1903] 2 I. R. 95.

(*k*) Williams (10th ed.) 347.

(*l*) Wilson *v.* Hodson, (1872) L. R. 7 Ex. 84.

(*m*) Hindmarsh *v.* Southgate, (1827) 3 Russ. 324.

(*n*) Stott *v.* Meanock, (1862) 31 L. J. Ch. 746.

(*o*) *Re* Garnes, (1885) 31 C. D. 151.

CHAPTER IV.

WHAT THE EXECUTOR MAY DO BEFORE PROBATE.

What executor may do before probate.

Since the executor derives all his interest from the Will itself, and the property vests in him from the moment of the testator's death, and the probate is merely the authenticated evidence of his title, it follows he may do almost all the acts which are incident to his office, except only some of those which relate to suits. He may take possession of and sell, assign, and dispose of the testator's effects, pay or release debts, and may distrain for rent due to the testator. He may also assent to, or pay, legacies, and the assent is good though he die before probate. So all payments made to him are good, and shall not be defeated though he dies and never proves the Will (*a*).

Production of probate to support title of assignee, or specific legatee.

But although an executor may before probate by assignment of a term for years or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee, yet, if it be necessary to support that title by showing the right to make the assignment, or give the assent, this can only be effected by producing the probate, or should the executor die after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead (*b*).

Purchaser not bound to pay purchase money without production of probate.

Again, although an executor can before probate make an assignment and give a receipt for purchase money, yet a purchaser is not bound to pay the purchase money till probate, because till the evidence of title exists the executor cannot give a complete indemnity (*c*), as a Will of later date

(*a*) See Williams (10th ed.) 220 *et seq.*

(*b*) Williams (10th ed.) 221; and see Johnson *v.* Warwick, (1856) 17 C. B. 516.

(*c*) Williams (10th ed.) 222; and see Newton *v.* Metropolitan Railway Co., (1861) 1 Dr. & Sm. 583.

might be found, or probate might be refused on the ground that it was made under undue influence.

Executor cannot maintain action in representative character without production of probate.

An executor cannot maintain (*i.e.*, prosecute to a successful conclusion) actions before probate unless such as are founded on his actual possession; for in actions where he sues in his representative character he may be compelled, by the course of pleading, to produce the letters testamentary at the trial, or in some cases by an application to the Court at an earlier stage of the cause; and in those actions where he sues in his individual capacity, relying on his constructive possession as executor (*i.e.*, the possession in law arising from the property in the goods), although he does not name himself as executor, yet, generally speaking, it will be necessary for him to prove himself executor at the trial, which he can only do by showing the probate (*d*).

Proceedings may be stayed at instance of defendant until production of probate.

Although the executor suing as such may commence the action before probate, yet if the defendant does not dispute the plaintiff's title, and is ready to pay what is claimed on production of the probate, the Court will on the defendant's application stay proceedings until production of probate, and thus prevent needless costs being incurred (*e*).

Presentation of petition in bankruptcy, or to wind up company, before probate.

So also an executor of a creditor before probate can present a petition in bankruptcy (*f*), or a winding-up petition under the Companies Act (*g*), but he must obtain probate before the hearing of the petition.

By the Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11, the production of a grant of representation from a Court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom; but by virtue of the Revenue Act, 1889 (52 & 53

(*d*) Williams (10th ed.) 222; and see Smith *v.* Milles, (1786) 1 T. R. 475, 480.

(*e*) Webb *v.* Adkins, (1854) 14 C. B. 401; Tarn *v.* Commercial Bank of Sydney, (1884) 12 Q. B. D. 294.

(*f*) Rogers *v.* James, (1816) 7 Taunt. 147; *Ex parte* Paddy, (1818) 3 Madd. 241.

(*g*) *Re* Masonic & General Life Assurance Co., (1886) 32 C. D. 373.

Vict. c. 42), s. 19, where a policy of life insurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy These latter words apply also to legal proceedings in which the title to the money payable under the policy is established (*h*).

Life insurance policy money.

A creditor of a deceased debtor cannot sue a person named as executor in the Will of the deceased unless he has either administered, that is, intermeddled with the assets, or proved the Will, and consequently the seizure and sale of part of the testator's assets under an execution founded on a judgment in a suit, where the executor had neither administered nor proved, was held to be ineffectual to bind the testator's estate (*i*).

Creditor of deceased debtor cannot sue executor until executor has intermeddled or proved.

(*h*) Haas *v.* Atlas Assurance Co., Ltd., [1913] 2 K. B. 209.

(*i*) Mohamidu *v.* Pitchey, [1894] A. C. 437.

CHAPTER V.

OF PROBATE.

SECT. 1.—*Jurisdiction of the Probate Division of the High Court.*

Jurisdiction to grant probate.

Prior to the Court of Probate Act, 1857.

AT the time of the passing of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the Ecclesiastical Court was the only Court in which the validity of Wills of personalty could be established or disputed, except in the case of certain Courts Baron that had had probate of Wills time out of mind. The Court of the Ordinary of the place wherein the testator dwelt (generally speaking the bishop of the diocese) was the regular Court of Probate. Certain districts, however, were exempt from this jurisdiction and were called Peculiars, because they had a peculiar and special Ordinary of their own. If the deceased, at the time of his death, had effects to such an amount as to be considered notable goods, usually called *bona notabilia*, within some other diocese or peculiar than that in which he died, then the Will must have been proved before the Metropolitan of the province by way of special prerogative; whence the Courts where the validity of such Wills were tried, and the offices where they were registered, were called the Prerogative Courts and the Prerogative Offices of Canterbury and York (*a*).

Under the Court of Probate Act, 1857.

By s. 3 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), the jurisdiction of Ecclesiastical and other Courts to grant or revoke probate of Wills was abolished, and by s. 4 of the same Act became vested in the Court of Probate. By s. 23 the Court of Probate was constituted a Court of Record with the same powers in relation to the personal estate in all parts of England of deceased persons as the

(*a*) See Williams (10th ed.) 208, 209.

Prerogative Court of the Archbishop of Canterbury then had in the province of Canterbury in relation to those matters and causes testamentary and those effects of deceased persons which were within its jurisdiction; provided that no suits for legacies, or suits for the distribution of residue, should be entertained by the Court, or by any Court or person whose jurisdiction as to matters and causes testamentary was thereby abolished. And by s. 29 the practice of the Court of Probate, except where otherwise provided by the Act, or by the rules or orders to be made under it, was, so far as the circumstances of the case would admit, to be according to the then practice of the Prerogative Courts.

Under the Judicature Act, 1873.

After 1st November, 1875, by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 3, 16, the Court of Probate became part of and its jurisdiction was transferred to the High Court of Justice, and by s. 34 all causes and matters which would have been within the exclusive cognisance of the Court of Probate if the Act had not passed were assigned to the Probate, Divorce and Admiralty Division of the High Court.

Application of rules and orders of Court of Probate.

Sect. 18 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), provides that the rules and orders of the Court of Probate are to remain in force until altered or annulled by any rules of Court made after the Act of 1875, and the president of the Probate Division shall have with regard to non-contentious or common form business the powers conferred on the judge of the Probate Court by s. 30 of the Court of Probate Act, 1857. The rules and orders of the Court of Probate have not been abrogated, consequently the rules and orders under the Judicature Act do not apply in non-contentious business, but they apply to contentious business where not inconsistent with the rules and orders of the late Court of Probate, or where they contain any new provisions as to probate practice (*b*). Distinct rules in the Probate Court

Extent to which R.S.C. apply.

(*b*) In the Goods of Tomlinson, (1881) 6 P. D. 209; In the Goods of Caspari, (1897) 75 L. T. 663; Druce *v.* Young, [1899] P. 84, 101.

dealing with a particular subject-matter remain in force notwithstanding that there may be a different rule dealing with that subject-matter in the Rules of the Supreme Court (*c*).

Rules and orders under the provisions of the Court of Probate Acts, 1857 and 1858, have from time to time been made, and those now in force in non-contentious business for the Principal and District Probate Registries are the Rules and Orders of 1862, 1866, 1871, 1873, 1887, 1892, 1894, 1896, and 1897, and in addition for the District Registries the Rules and Orders of 1863 and 1871; and in contentious business the Rules and Orders of 1862, 1865, and 1874 (*d*).

Court of Probate not a Court of Construction.

As long as the Ecclesiastical Courts had exclusive testamentary jurisdiction they were also Courts of Construction as well as Courts of Probate (*e*), but the new Court of Probate is not a Court of Construction, since by s. 23 of the Act of 1857 it is prohibited from entertaining suits for legacies or for the distribution of residue. By s. 34 of the Judicature Act, 1873, all causes and matters for the administration of the estates of deceased persons, and for the execution of trusts, are assigned to the Chancery Division of the High Court. It is, however, sometimes necessary for the Probate Division to construe the Will in order to determine who is entitled to the grant of administration (*f*).

Jurisdiction on appeals.

Formerly, under stat. 25 Hen. VIII. c. 19, appeals in matters testamentary were to the Court of Delegates, who were appointed by commission issued to both judges and civilians. The power of this Court was by 3 & 4 Will. IV. c. 92 transferred to the Judicial Committee of the Privy Council, and by s. 39 of the Court of Probate Act, 1857, to the House of Lords. Now, since the Judicature Act, 1875, appeals from the Probate Division are to the Court of Appeal.

(*c*) *Re* Hailstone, [1909] P. 118.

(*d*) For these rules and orders see Tr. & Coo. P. P. (14th ed.).

(*e*) Williams (10th ed.) 215.

(*f*) See In the Estate of Lupton, [1905] P. 321; Wrigley *v.* Lowndes, [1908] P. 348.

Sect. 2.—*Jurisdiction of the County Court.*

Co-ordinate jurisdiction in contentious proceedings where personal estate is under £200 and real estate does not exceed £300 in value.

By 21 & 22 Vict. c. 95, s. 10, where it appears that the personal estate of the deceased without deducting debts was at the time of his death under the value of £200, and the deceased was not entitled beneficially to any real estate of the value of £300 or upwards, the judge of the County Court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the Will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto.

Judge of Probate Division may remit to County Court any contentious matter within the County Court jurisdiction.

By s. 59 of 20 & 21 Vict. c. 77, it is not obligatory to apply for probate or administration to any district registry, or through any County Court; but in any contentious matter the judge of the Probate Division may send any cause within the contentious jurisdiction of a County Court to such County Court to be proceeded with there. And by s. 12 of 21 & 22 Vict. c. 95, the jurisdiction under s. 59 of the previous Act is extended to an application for the revocation of a grant of probate or administration as well as to an application for any such grant (*g*).

Appeal from County Court.

An appeal lies from the determination of the judge of the County Court to a Divisional Court of the Probate Division of the High Court (*h*).

Sect. 3.—*Jurisdiction of District Registries.*

District registrars may grant probate or letters of administration in common form.

By s. 13 of the Court of Probate Act, 1857, district registries under the control of the Court of Probate were established throughout England and Wales in the several places mentioned in Schedule A to the said Act. And s. 46 of the Act authorises probate of a Will or letters of administration to be granted in common form by the district registrar

(*g*) As to the practice in contentious business in the County Court see County Court Rules, 1889, Ord. XLIX.

(*h*) 20 & 21 Vict. c. 77, s. 58; R. S. C., Ord. 59.

if it shall appear by affidavit of some or one of the applicants that the testator or intestate at the time of his death had a fixed place of abode within the district. The district registrar is prohibited by s. 48 from making any grant where there is contention as to the grant, or where it appears to him that probate or administration ought not to be granted in common form.

Notice to be transmitted to principal registry.

The Act also provides (s. 49) for transmission to the principal registry of notice of every application to any district registry, and no probate or administration shall be granted in pursuance of such application until after certificate from the principal registry that no other application appears to have been made in respect of the goods of the same deceased person. It also makes provision (s. 51) for transmission of lists of probates and administrations and certified copies of Wills to the principal registry, and (s. 52) for the safe custody of original Wills.

No grant to be made until after certificate from principal registry.

Lists to be transmitted.

Not obligatory to apply to district registry.

It is not obligatory to apply to any district registry for probate or administration in common form, but in every case the application may be made through the principal registry (s. 59) (*i*).

Sect. 4.—*Manner of obtaining probate.*

The only person to whom probate of the Will can be granted is the executor named in it either expressly or according to the tenor.

Will must be filed before citation.

Before any citation can issue in respect of a Will to accept or refuse probate the Will must be filed (*k*).

Court may order any testamentary paper to be brought into the registry :

By the Court of Probate Act, 1857, s. 26, the Court may in a summary way order any person to produce and bring into the principal or any district registry, or otherwise as the Court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person ; and if it be not shown that any such paper or writing is in the possession or

(*i*) And see P. R., 1862, r. 1 ; D. R. 1863, r. 1.

(*k*) Tr. & Coo. P. P. (14th ed.) 259.

under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court or upon interrogatories respecting the same, and he shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the Court, and had made such default; and the costs of any such proceeding shall be in the discretion of the Court.

or direct any person to attend to be examined as to his knowledge respecting any testamentary paper.

Costs in the discretion of the Court.

Further, by s. 23 of 21 & 22 Vict. c. 95, the registrar of the principal registry may issue a subpœna requiring any person to produce and bring into the principal or any district registry any paper or writing being or purporting to be testamentary, and such person shall be subject to the like process of contempt in case of default as under an order of the Court.

Registrar may issue subpœna for production.

A solicitor has not any lien on a Will which he has made for his client, since he engages to make the instrument effectual for the purposes of the testator, which it cannot be unless it is produced elsewhere (*l*).

Solicitor has no lien on original Will for costs.

All testamentary papers should be brought into the registry. Practitioners have no right to keep Wills of deceased persons in their possession (*m*); and where a Will after the death of the testator has been delivered to a solicitor by his client, the solicitor has not any privilege whatever in the matter, as the Will does not belong to the client, but to the Court, and the solicitor will be ordered to lodge it in the probate registry (*n*).

All testamentary papers should be brought into the registry.

A motion to attach a person for not complying with an order made under s. 26 of the Probate Act, 1857, directing his attendance for cross-examination as to his knowledge of

(*l*) Lord *v.* Wormleighton, (1822) Jac. 580, 581, per Ld. Eldon.

(*m*) Williams (10th ed.) 231.

(*n*) In the Estate of Harvey, [1907] P. 239.

any testamentary paper will be refused unless it is shown that his conduct money has been paid or tendered (*o*).

Provision for preservation of original Wills, and for obtaining official copy of the whole or any part of a Will, or certificate of grant of letters of administration.

The Court of Probate Act, 1857 (ss. 66—69), makes provision for the deposit and preservation of all the original Wills brought into the Court, or of which probate, or administration with the Will annexed, is granted, in the principal or district registries, and for obtaining an official copy of the whole or any part of a Will, or an official certificate of the grant of any letters of administration from the registry where the Will has been proved or the administration granted.

Provision for depositing Wills of living persons.

Sect. 91 of the same Act also provides for safe and convenient depositories under the control of the Court for Wills of living persons who may deposit them, upon payment of fees.

When probate or letters of administration may issue.

By Probate Rules, 1862, r. 43, "no probate or letters of administration with the Will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars."

And by rule 45, "in every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit."

Where death can be proved but not the exact date, it is sufficient for the applicant for the grant to swear that the deceased died on some day between certain dates (*p*).

When death may be presumed.

If a death cannot be proved recourse must be had to the presumption of law, that is, it may be presumed that a man is dead at the expiration of seven years from the time he was last known to be living (*q*). There is, however, no legal

No legal presumption as to date of death,

(*o*) In the Estate of Harvey, *ubi sup.*

(*p*) In the Estate of Long-Sutton, [1912] P. 97.

(*q*) Doe *v.* Jesson, (1805) 6 East, 80, 85; Doe *v.* Nepean, (1833) 5 B. & Ad. 86; S. C. in error, (1837) 2 M. & W. 894.

nor death without issue.

presumption as to the date of the death (*r*), nor of death without issue (*s*).

Those who found a right upon a person having survived a particular period (*t*), or having died without issue (*u*), must establish that fact affirmatively by evidence. Where husband and wife executed identical Wills, each appointing the other universal legatee and sole executor, and substituting executors in case of the other dying first, and both were lost in the same ship, and there was no evidence that either of them survived the other, the Court made a grant of administration with the Will annexed of the estate of each to one of the next-of-kin of each, as in case of an intestacy (*x*). Applications in such cases for grants of probate or administration are made in the Principal Probate Registry and not by motion to the Court (*y*). In certain circumstances, where death may be inferred, the Court will modify the usual form of oath and allow the applicants to swear to their belief in the death (*z*).

A testament may be proved in two ways: either in Common Form or in Solemn Form.

Proof in common form.

A Will is proved in common form when the executor presents it before the judge and, in the absence of, and without citing, the parties interested, produces witnesses to prove the same; who testifying by their oaths that the testament exhibited is the true, whole, and last Will and testament of the deceased, the judge thereupon, and sometimes upon less proof, annexes his probate and seal thereto (*a*).

Attestation clause being regular, oath of executor alone sufficient.

If the Will be perfect on the face of it, and there is an attestation clause referring to the solemnities required by the statute 1 Vict. c. 26, s. 9, as having been complied with,

(*r*) Doe *v.* Nepean, (1833) 5 B. & Ad. 86; In the Goods of Smith, (1861) 2 Sw. & Tr. 508.

(*s*) *Re* Jackson, [1907] 2 Ch. 354.

(*t*) *Re* Phene's Trust, (1869) L. R. 5 Ch. 139, 152; In the Goods of Nicholls, (1872) L. R. 2 P. & D. 461; *Re* Aldersey, [1905] 2 Ch 181.

(*u*) *Re* Jackson, *ubi sup.*

(*x*) In the Goods of Alston, [1892] P. 142; and see *post*, p. 469.

(*y*) In the Estate of Roby, [1913] P. 6.

(*z*) In the Estate of Walker, [1909] P. 115.

(*a*) Williams (10th ed.) 238.

probate in common form may be obtained upon the oath of the executor alone (*b*).

But if there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed formalities, an affidavit is required from one of the subscribing witnesses, by which it must appear that the Will was executed in compliance with the statute (*c*). Otherwise affidavit from one of the attesting witnesses requisite.

If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort must be had to other persons (if any) who may have been present at the execution of the Will or codicil; but if no affidavit of any such other person can be obtained, evidence on affidavit must be procured of that fact and of the handwriting of the deceased and the subscribing witnesses, and also of any circumstances which may raise a presumption in favour of the due execution (*d*). Or other evidence of due execution.

By Probate Rules, 1862, r. 6, if on perusing the affidavits it appear doubtful whether the Will or codicil has been duly executed, the registrars may require the parties to bring the matter before the judge on motion. Procedure if Will not properly attested.

Where the signature of the testator and the attestation clause are on the face of the Will regular, the Court will not on affidavit of irregularity decree administration to pass to the effects of the deceased as dead intestate unless the Will has been propounded (*e*), even on the consent of all parties (*f*).

Probate Rules, 1862, rr. 9, 10, and 11, give directions as to what affidavits shall be required to prove that interlineations or alterations, erasures, and obliterations existed in the Will before its execution. As to proving interlineations or alterations.

Where alterations are satisfactorily shown to have been made before the execution, it is usual to engross the probate copy of the Will fair, inserting the words interlined in How probate copy is engrossed.

(*b*) Williams (10th ed.), 239.

(*c*) *Ibid.*; P. R., 1862, r. 4.

(*d*) P. R., 1862, r. 7; for forms of affidavits see Tr. & Coo. P. P (14th ed.) pp. 768 *et seq.*

(*e*) In the Goods of Ayling, (1838) 1 Curt. 913.

(*f*) In the Goods of Watts, (1837) 1 Curt. 594.

their proper places, and omitting words struck through or obliterated. But in cases where the construction of the Will may be affected by the appearance of the original paper, the Court will order the probate to pass in *fac simile*. A *fac simile* probate is conclusive in the Courts that the Will was at its execution in the state in which it appears in the probate (*g*).

Later of two Wills betraying insanity, after citation, probate in common form may be granted of the earlier.

Where there are two Wills, and the later Will betrays on the face of it insanity, if after citation the persons cited decline to propound it and consent to probate of the earlier Will, probate of the earlier Will will be granted in common form (*h*).

Practice of non-contentious business as to grants under the Land Transfer Act, 1897.

By Probate Rules, 1897, r. 109, "All rules, orders and instructions and the existing practice of the Court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897."

Proof in solemn form (contentious business), by issue of writ in an action.

Parties interested must be cited.

The proof of Wills in solemn form is part of the "contentious business" of the Probate Division, and is commenced by the issue of a writ of summons in an action, which is substituted for suit by citation in the Court of Probate (*i*). But the old practice is retained of giving notice by citation to any interested party of an action pending for the purpose of binding them by the judgment of the Court (*k*).

Executor proving in common form may be compelled to prove in solemn form within 30 years.

The difference between probate in common form and in solemn form, with respect to citing the parties interested, works this diversity of effect, viz., that the executor of the Will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form, so that if the witnesses be dead in the meantime it may endanger the whole testament, but

(*g*) Gann *v.* Gregory, (1854) 3 De G. M. & G. 777; and see Williams (10th ed.) 240.

(*h*) Palmer *v.* Dent, (1850) 2 Robert 284.

(*i*) See R S. C., 1883, Ord. 1, r. 1.

(*k*) See R. S. C., Ord. 16, r. 10; Williams (10th ed.) 241; Tr. & Coo. P. P. (14th ed.) pp. 257 *et seq.*

a testament once proved in solemn form, the executor cannot be compelled to prove it again. Hence, not only are Wills proved in solemn form at the instance of persons who desire to invalidate them, but the executor himself may, and in prudence often does, for greater security, propound and prove the Will in the first instance in solemn form (*l*), and is entitled to deduct his costs of so doing out of the estate (*m*).

Procedure if executor doubts validity of codicil.

If the executors doubt the validity of a codicil they should not cite the asserted legatees under the codicil to propound the codicil, but they should proceed to prove the Will in solemn form, and cite the next-of-kin and asserted legatees under the codicil to see the Will proved (*n*).

Procedure for putting executor to proof in solemn form after proof in common form.

Where an executor has proved the Will in common form, a party desirous of putting him to proof in solemn form commences an action for revocation, having first cited the executor to bring in the probate. If the executor desires to sustain the Will, he must either plead and propound it in the action for revocation, or he must commence an action himself to obtain proof in solemn form (*o*).

Next-of-kin entitled to call for proof in solemn form.

The next-of-kin, as such merely, are entitled to call for proof in solemn form of the deceased's Will, of common right; and the mere acquiescence of a next-of-kin to the probate being taken in common form is no bar to the exercise of this right, even though he has received a legacy as due to him under the Will (*p*). But before a legatee who has received all or part of his legacy can be permitted to dispute the Will, he must bring into Court the amount of the legacy paid to him to abide the event of the suit (*q*).

But next-of kin, privy to proceedings

A next-of-kin, though not cited to see proceedings, and not having intervened, if in fact cognisant of a suit between

(*l*) Williams (10th ed.) 242.

(*m*) Burls *v.* Burls, (1868) L. R. 1 P. & D. 472, 476.

(*n*) In the Goods of Benbow, (1862) 2 Sw. & Tr. 488; In the Goods of Chamberlain, (1867) L. R. 1 P. & D. 316; and see *post*, p. 158.

(*o*) Williams (10th ed.) 243; *post*, p. 158.

(*p*) *Ibid.*; as to what amounts to waiver see Goddard *v.* Smith, (1872) L. R. 3 P. & D. 7.

(*q*) Williams (10th ed.) 245.

and not intervening, cannot afterwards oppose probate,

unless decree is founded on a compromise by which he is not bound.

the executor and another next-of-kin, ending in the establishment of the Will, is not at liberty in any way to oppose probate being taken (*r*), but this rule does not apply where the decree is founded on a compromise between the contesting parties (*s*). It is not necessary in the Probate Court that a person should be a party to a suit in order that he should be bound by the results. If he is privy to the proceedings it is sufficient. But a compromise is an agreement by which he is not bound unless a party to it (*t*).

Renunciation of administration *c. t. a.* no bar to contesting Will.

A legatee, having renounced administration *cum testamento annexo*, is not barred from contesting the validity of the Will (*u*).

Legatee cannot set up Will after it has been pronounced against:

but may intervene pending suit.

A legatee cannot set up a Will after it has been litigated between the executor and next-of-kin, or between the executor and the executor of another Will, and pronounced against, unless he can show the parties agreed to set aside the Will by fraud or collusion. But he may intervene for his interest pending the suit, but apparently not after the hearing (*x*).

Slightest interest sufficient to oppose Will.

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to enable a person to oppose a testamentary instrument (*y*).

Though a next-of-kin may, as such, oppose all the testamentary papers, he has not a right to oppose any particular one he may think fit, for some interest in it, however remote, is necessary (*z*).

Creditor cannot contest Will, unless administration has been granted to him.

A creditor cannot controvert the validity of a Will; for it is indifferent whether he receive his debt from an executor or an administrator; but when administration has been granted to a creditor, he may oppose a Will the same as the next-of-kin (*a*).

(*r*) Ratcliffe *v.* Barnes, (1862) 2 Sw. & Tr. 486.

(*s*) Wytcherley *v.* Andrews, (1871) L. R. 2 P. & D. 327.

(*t*) *Ibid.*; and see Mecredy *v.* Brown, (1906) 2 I. R. 437.

(*u*) Gascoyne *v.* Chandler, (1755) 2 Lee 241.

(*x*) Williams (10th ed.) 246; Peters *v.* Tilley, (1886) 11 P. D. 145.

(*y*) Dixon *v.* Allinson, (1864) 3 Sw. & Tr. 572.

(*z*) Williams (10th ed.) 246; Baskcomb *v.* Harrison, (1849) 2 Robert 118.

(*a*) Williams (10th ed.) 246.

Probate not granted of Will pending litigation as to validity of codicil.

Probate of a Will cannot be granted to the executor while a contest subsists about the validity of a codicil; for that being undetermined, it does not appear what is the Will, and the executor cannot take the common oath (*b*). But where a question arose as to the validity of a codicil revoking the appointment of a co-executor, and the estate required an immediate representative, probate of the undisputed instruments was granted to the other executor, with consent of the co-executor, reserving all questions (*c*).

What is the probate.

When a Will is proved the original is deposited in the registry, and a copy thereof on parchment is made out under the seal of the Court and delivered to the executor, together with a certificate of its having been proved, and such copy and certificate are usually styled the probate (*d*).

When scurrilous matter may be excluded from probate.

The Court cannot expunge any part of the original Will of an offensive or scurrilous character (*e*), and although the Court may have power to omit such matter from the engrossment of the Will for probate, and from the copy kept in the registry, it is a power to be exercised with great moderation and the Court will not interfere on light grounds (*f*).

Lost probate.

Where the probate is lost, the Spiritual Court never granted a second, but merely an exemplification of the probate from their own records, and such exemplification was evidence of the Will having been proved (*g*).

Sect. 5.—*Of evidence in testamentary matters.*

Rules of evidence.

By s. 33 of the Probate Act, 1857, "The rules of evidence observed in the Superior Courts of Common Law at Westminster shall be applicable to, and observed in, the trial of all questions of fact in the Court of Probate."

By the common law the evidence of all persons having

(*b*) Neagle *v.* Cantillon, (1755) 2 Lee, 246; Williams (10th ed.) 297.
(*c*) Fowlis *v.* Davidson, (1845) 4 N. C. 149.
(*d*) Williams (10th ed.) 299.
(*e*) Curtis *v* Curtis, (1825) 3 Add. 33.
(*f*) In the Goods of Honywood, (1871) L. R. 2 P. & D. 251.
(*g*) Williams (10th ed.) 299.

an interest, and the husbands or wives of such persons, was inadmissible (*h*).

Sect. 14 of the Wills Act, 1837, provides that a Will shall not be invalidated on account of the person attesting the execution being at the time or becoming incompetent to be admitted a witness to prove the execution thereof. Sect. 15 invalidates any devise, legacy, estate, interest, gift or appointment (other than and except charges and directions for the payment of any just debt or debts) so far as concerns any person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband, but the person so attesting is admitted as a witness to prove the execution or the validity of the Will.

Sect. 16 enabled a creditor attesting to be admitted a witness.

Sect. 17 exempted a person appointed executor from being incompetent to prove the execution or validity of the Will.

Now by several statutes subsequently passed, the common law rule above referred to is entirely abrogated (*i*).

Evidence in determining what constitutes the Will.

In determining what documents constitute the Will of a testator it is the duty of the Court to ascertain from the contents of the documents themselves, or, if need be, by recourse to external evidence, what was the intention of the testator (*k*). In the Court of Probate the whole question is one of intention—the *animus testandi* and the *animus revocandi* are completely open to investigation (*l*). Accordingly, in cases of doubt upon the face of the documents, touching the *factum* of the whole or any part of any testamentary instrument, external evidence is admissible to explain the intention of the testator, as, for instance, where the question is whether or not the testator intended the last instrument to constitute his sole Will, and so by implication

(*h*) Williams (10th ed.) 251.

(*i*) 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, s. 2; and 16 & 17 Vict. c. 83, s. 1.

(*k*) Chichester *v.* Quatrefages, [1895] P. 186.

(*l*) Methuen *v.* Methuen, (1817) 2 Phillim. 416, 426; and see *ante*, p. 40.

to revoke the first (*m*). But in such cases it would seem the Court will not look at anything more than is needed to put it in possession of the facts known to the testator at the time the Will in question was executed (*n*).

In *In the Goods of Thompson* (*o*) the question was whether the confirmation of the Will and the four codicils contained in the fifth codicil was a mistake, the intention of the testator being to confirm the Will and the fourth codicil, and there being no evidence as to how certain alterations in the fifth codicil, which gave rise to the question, had been made, the Court admitted evidence of the testator's verbal instructions to his solicitor for the preparation of the fifth codicil.

Parol evidence of surrounding circumstances is admissible, where there is an ambiguity on the face of the Will, as to the person intended by the testator as executor, but declarations by the testator himself as to his intentions are, it would seem, inadmissible (*p*).

Error in date of a Will may be proved although effect is to revoke Will of later date.

Parol evidence is admissible to prove that a Will was executed on a date other than that which appears upon the face of it, although the effect of such evidence is to revoke an earlier Will bearing a later date (*q*).

When knowledge of contents of Will is assumed.

In the absence of fraud, although the testator may be innocently misinformed as to the effect of the instrument, yet if it has been read over to him on the occasion of its execution, or its contents brought to his notice in any other way, it is to be assumed that he approved of as well as knew the contents (*r*). And if a testator employs another to convey his meaning in technical language, and that person makes a mistake in doing it, the mistake is the same as if the

(*m*) Jenner *v.* Ffinch, (1879) 5 P. D. 106; In the Estate of Bryan, [1907] P. 125; and see In the Estate of Vines, [1910] P. 147, 150.

(*n*) In the Estate of Bryan, *ubi sup.*

(*o*) (1865) L. R. 1 P. & D. 8.

(*p*) In the Goods of Brake, (1881) 6 P. D. 217; In the Goods of Chappell, [1894] P. 98.

(*q*) Reffell *v.* Reffell, (1866) L. R. 1: P. & D. 139.

(*r*) Guardhouse *v.* Blackburn, (1866) L. R. 1 P. & D. 109; Collins *v.* Elstone, [1893] P. 1; Beamish *v.* Beamish, [1894] 1 Ir. 7, where the law as to when knowledge and approval of the Will is to be presumed is considered.

testator had employed that technical language himself (*s*). There is, however, no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a Will read over to him, and has thereupon executed it, all further inquiry is shut out (*t*).

Court has no power to correct omissions.

Since by the Wills Act the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the Act, it follows that the Court has no power to correct omissions in a Will made after the Act; but the Court has power if words have been inserted in a Will by fraud or by mistake, to correct the error by the omission of words so inserted (*u*).

Words cannot be substituted:

Where a word inserted by mistake is struck out, leaving a blank in its place, another word cannot be substituted, and it is for the Court of Construction to determine the meaning and effect of the Will having regard to the blank (*x*).

The Court will not order to be inserted in the probate words actually missing from a torn Will which has been pieced together, but the practice to be followed in such a case, where satisfactory oral evidence is before the Court proving what the missing words were, is to allow a document shewing what those words are proved to have been to be annexed to the probate (*y*).

although rejection of part may destroy validity of remainder.

Although where a portion of a Will introduced through fraud or inadvertence may be rejected and probate granted of the remainder if the two are severable, yet where the rejection of part alters the sense of the remainder, it may be a question whether there is a valid Will at all within the meaning of s. 9 of the Wills Act, 1837 (*z*).

Declarations of testator: When admissible to rebut

When a question arises whether alterations on the face of a Will were made before or after execution, the statements of

(*s*) Morrell *v.* Morrell, (1882) 7 P. D. 68, 70.

(*t*) Fulton *v.* Andrew, (1875) L. R. 7 H. L 448

(*u*) See Williams (10th ed) 258; and see Morrell *v.* Morrell, *ubi sup.*; In the Goods of Schott, [1901] P. 190.

(*x*) In the Goods of Walkeley, (1893) 69 L. T. 419; Vaughan *v.* Clerk, (1902) 87 L. T. 144.

(*y*) Gill *v.* Gill, [1909] P. 157.

(*z*) Rhodes *v.* Rhodes, (1882) 7 App. Cas. 192, 198.

a testator made before the execution of the Will may be given in evidence showing an intention to benefit an individual which will not be carried out unless the alterations are admitted (*a*) ; but a declaration by the testator after the Will was executed that the alteration had been made previously would be inadmissible (*b*).

presumption that unattested alterations were made after execution.

In questions, however, of fraud and testamentary capacity, declarations of a testator, whether made before or after a Will has been executed, are admissible (*c*).

To prove testamentary capacity or fraud.

Statements made by a testator are not admissible to prove the execution by him of a Will, and they are equally inadmissible to prove that the Will was executed in duplicate (*d*).

Not to prove execution.

In order to rebut the presumption of revocation arising from a Will which was in a testator's possession not being found after his death, and to establish what is called adherence to the Will, evidence of statements made by the testator subsequently to the execution of the Will that he intends to act in conformity with the dispositions contained in the Will is admissible, and it follows that statements made by a testator to a contrary effect must also be admissible (*e*).

To rebut presumption of revocation.

The contents of a lost Will, like those of any other lost instrument, may be proved by secondary evidence (*f*), and declarations, written or oral, made by a testator before the execution of his Will, are, in the event of its loss, admissible as secondary evidence of its contents. Such declarations, however, are not strictly evidence of the contents of the instrument, but simply evidence of the intention of the person who afterwards executes the instrument, and its cogency depends very much on the nearness in point of time of the declaration of intention to the period of the execution

To prove contents of Will.

(*a*) Doe *v.* Palmer, (1851) 16 Q. B. 747 ; Dench *v.* Dench, (1877) 2 P. D. 60.

(*b*) Doe *v.* Palmer, *ubi sup.*

(*c*) Doe *v.* Hardy, (1836) 1 Moo. & Rob. 525 ; Sutton *v.* Sadler, (1857) 3 C. B. N. S. 99 ; Doe *v.* Palmer, *ubi sup.*, at p. 579.

(*d*) Atkinson *v.* Morris, [1897] P. 40.

(*e*) Keen *v.* Keen, (1873) L. R. 3 P. & D. 105 ; and see Sugden *v.* Lord St. Leonards, (1876) 1 P. D. 154, at p. 228.

(*f*) Sugden *v.* Lord St Leonards, *ubi sup.*

of the instrument, and it must satisfy the Court beyond all reasonable doubt that it has really before it the testamentary intentions of the testator (*g*).

Whether declarations made after the execution of the Will are admissible as evidence of its contents is not free from doubt. In *Sugden* v. *Lord St. Leonards* (*h*) the Court of Appeal (Mellish, L.J., dissenting) overruled *Quick* v. *Quick* (*i*), and decided that such declarations were admissible as secondary evidence of the contents. But in *Woodward* v. *Gouldstone* (*k*) the House of Lords considered that the point so decided in *Sugden* v. *Lord St. Leonards* would be open to review, and their lordships expressly guarded themselves against its being supposed that they held that such post testamentary declarations are admissible.

Contents proved by evidence of single witness.

The contents of a lost Will may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached (*l*).

Contents proved in part.

When the contents of a lost Will are not completely proved probate will be granted to the extent to which they are proved (*m*).

No degrees of secondary evidence.

There are no degrees of secondary evidence, and where a Will has been lost, and evidence of its contents is supplied by the production of a draft, and of the parol testimony of persons who had read the Will, the parol testimony must be placed side by side with the draft, and out of them the Court will extract the contents of the Will to be proved (*n*).

A person who propounds for probate an alleged Will, and who is unable to produce it, or any copy or draft of it, or any written evidence of its contents, is bound to prove its contents and its due execution and attestation by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on those points (*o*).

(*g*) Sugden *v.* Lord St. Leonards, (1876) 1 P. D. 154, at p. 242.
(*h*) *Ubi sup.*
(*i*) (1864) 3 Sw. & Tr. 442.
(*k*) (1886) 11 App. Cas. 469.
(*l*) Sugden *v.* Lord St. Leonards, *ubi sup.*
(*m*) *Ibid.*
(*n*) Burls *v.* Burls, (1868) L. R. 1 P. & D. 472; and see Gill *v.* Gill, [1909] P. 157, *ante*, p. 90.
(*o*) Harris *v.* Knight, (1890) 15 P. D 170, 179, per Lindley, L.J.

When maxim "*Omnia præsumuntur rite esse acta*" may be applied.

The maxim "*Omnia præsumuntur rite esse acta*" expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; and when the actual observance of all due formalities can only be inferred as a matter of probability (*p*). Consequently where the contents of the Will and signature of the testator were proved, but there was no attestation clause, and the attesting witnesses were both dead, and the handwriting of only one of them was proved the Court presumed that the lost Will was duly executed, and granted probate accordingly (*q*).

Sect. 6.—*Of what instruments Probate is necessary.*

Paper neither disposing of property nor appointing executor not admitted to probate,

A paper which neither disposes of property nor appoints an executor generally speaking has no testamentary character so as to enable the Court to grant probate of it (*r*). For instance, a Will simply appointing testamentary guardians and not disposing of property nor appointing an executor is not entitled to probate, since the jurisdiction of the Court to grant probate of an instrument is founded on the fact that it affects property (*s*).

unless a codicil revoking Will.

But a codicil, not containing any disposition of property, but simply revoking all former Wills, is of a testamentary nature, and ought to be admitted to probate. So if the executor after probate discovers any testamentary paper, he ought to bring it into the registry though it be a mere confirmation of the Will already proved (*t*).

Will relating to real estate only and not appointing executor must now be proved,

Prior to the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (3), there was no jurisdiction in the Probate Division to grant probate of a Will limited to the disposition of real property only, although it contained the appointment of an

(*p*) Harris *v.* Knight (1890) 15 P. D. 170.
(*q*) Harris *v.* Knight, *ubi sup.*
(*r*) Williams (10th ed.) 300.
(*s*) In the Goods of Morton, (1864) 153 Sw. & Tr. 422.
(*t*) Williams (10th ed.) 300; and see Widdall *v.* Nixon, (1853) 17 Beav. 160.

executor and the real estate was given to such executor with directions to convert the same into personal estate (*u*).

Now by that Act probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

unless relating only to foreign immovable property.

A Will dealing only with real and immovable property in a foreign country will not be admitted to probate in the Probate Division, and the Court will refuse to allow documents referring only to property in a foreign country to be included in the probate of the English Will (*x*).

Will in exercise of a power.

A Will made in exercise of a power must be proved (*y*), even though made in exercise of a special power (*z*).

Independent declaration of trust not admitted to probate.

A valid declaration of trust by a legatee may exist independently of the Will, and in that case it is not to be considered as a testamentary paper to be admitted to probate, although it may be received as evidence against the legatee of the nature of the trust on which the legacy is held by him (*a*).

When binding on legatee.

Where on the face of a Will it appears that a legacy is given to a legatee to be applied for purposes previously agreed upon between the testator and the legatee evidence is admissible to show what those purposes were (*b*).

Where the trust does not appear on the face of the Will, it can be enforced against the legatee if it relates to a definite object and the legatee has accepted the particular trust. It must of necessity be communicated to the legatee in the testator's lifetime, but it may be sufficiently communicated if put in writing and placed in his hands in a sealed envelope and he engages to hold the property given to him by the Will

(*u*) In the Goods of Barden, (1867) L. R. 1 P. & D. 325; In the Goods of Bootle, (1874) L. R. 3 P. & D. 177; In the Goods of Tomlinson, (1881) 6 P. D. 209.

(*x*) In the Goods of Tamplin, [1894] P. 39.

(*y*) Sugden on Powers (8th ed.) 466; Farwell on Powers (2nd ed.) 134

(*z*) *Re* Vallance, (1883) 24 C. D. 177. In the case of a colonial Will the colonial probate must be sealed under 55 Vict. c. 6.

(*a*) Smith *v.* Attersoll, (1826) 1 Russ. 266. With regard to secret trusts, see *post*, p. 215.

(*b*) *Re* Fleetwood, (1880) 15 C. D. 594; *Re* Huxtable, [1902] 1 Ch. 214; 2 Ch. 793.

upon the trusts so declared, although he did not know the actual terms of the trust; but an engagement to hold the property upon the terms of any paper that might be found after the testator's death would not be effectual (*c*).

What amounts to a trust.

A trust will be imposed on the legatee by expressly promising or tacitly consenting to carry out the testator's wishes, and whether the testator is thereby induced to make or to abstain from revoking a Will leaving him property. If, however, the legacy is given to two persons as tenants in common, the express promise or tacit consent of one of them that both will carry out the testator's wishes will not bind the other if he knows nothing of the matter until after the testator's death, since to hold otherwise would enable one beneficiary to deprive the other of his benefit by setting up a secret trust. But if the legacy is given to the two as joint tenants, there is a distinction between those cases in which the Will is made on the faith of the antecedent promise or tacit consent of one of the legatees and those in which the Will is left unrevoked on the faith of the subsequent promise or tacit consent; in the former the trust binds both legatees, since no person can claim an interest under a fraud committed by another; in the latter case the one and not the other is bound, since the gift is not tainted with any fraud in procuring the execution of the Will (*d*).

Where a gift is absolute, the intention of the testator, whether appearing on the face of the Will or communicated independently, that the property should reach another destination through the voluntary exercise by the legatee of his own right of ownership, and not through any contract, arrangement, or understanding, binding the conscience of the legatee, will not make the legatee a trustee (*e*).

Where the trust does not appear on the face of the Will, what a person takes under the trust is something not under the Will, but solely by virtue of the secret trust not disclosed

(*c*) *Re* Boyes, (1884) 26 C. D. 529.
(*d*) *Re* Stead, [1900] 1 Ch. 237, 240, per Farwell, J.
(*e*) See per FitzGibbon, L.J., in Geddis *v.* Semple, [1903] 1 Ir. R. 73.

on the Will (*f*). Consequently a person will not lose a benefit to which he is entitled under the trust by reason of his being a witness to the Will (*g*).

A letter written by a testator subsequently to making his Will declaring the trusts on which he has bequeathed property to his trustees cannot be admitted to probate, as the effect would be to receive as part of the Will, or as codicils to the Will, papers unattested (*h*). So also parol evidence is inadmissible to define or supplement that which on the face of the Will is left undefined or unexpressed (*i*).

Will of a deceased Sovereign.

No probate can be granted of the Will of a deceased Sovereign, and in the case of a claim under such a Will the proper course is for the claimant to proceed by petition of right (*k*).

Sealed packets.

An executor cannot safely deliver over sealed packets in pursuance of a direction in the Will, as they may contain securities for money or papers of a testamentary character which should be admitted to probate (*l*).

Sect. 7.—*Of Probate where there are several executors.*

Probate to one of several executors enures for the benefit of all.

Probate to one of several executors, the right of the other being reserved, enures to the benefit of all; and upon the death of the executor to whom probate has been granted the other executor may accept the office; and upon doing so fully represents his testator without further probate. For although a surviving executor on being cited may prove the Will a second time, yet in point of law the probate to the one executor enured to every purpose for which probate is necessary (*m*); but since 21 & 22 Vict. c. 95, s. 12, on the

(*f*) Cullen *v* Att.-Gen., (1866) L. R. 1 H. L. 190; O'Brien *v.* Condon [1905] I Ir. R. 51.

(*g*) O'Brien *v.* Condon, *ubi sup.*: not following in this respect *Re* Fleetwood, (1880) 15 C. D. 594.

(*h*) Johnson *v.* Ball, (1851) 5 De G. & Sm. 85; and see *ante*, pp. 11, 44, as to the circumstances under which papers referred to in a Will may be incorporated in the probate.

(*i*) *Re* Hetley, [1902] 2 Ch. 866.

(*k*) Ryves *v.* Duke of Wellington, (1846) 9 Beav. 579.

(*l*) Pelham *v.* Newton, (1754) 2 Lee, 46.

(*m*) Cummins *v.* Cummins, (1845) 3 J. & Lat. 64.

survivor's death without having taken probate, the representation to the testator, and the administration of his effects, shall go and devolve as if he had not been appointed executor (*n*).

So also limited probate.

So also where several executors are appointed with distinct powers, as for separate parts of the estate, or where an executor is appointed for a period and afterwards another person is appointed executor, probate of the Will by one executor is sufficient (*o*), except for the transmission of the office on death before having taken probate.

Practice to take out a double or cessate probate.

It is, however, usual and proper to take out what is called a double probate; or, where the first executorship has ceased, a cessate probate. In such cases the executor makes an oath as in other cases of probate, and he may be either sworn to and mark the original Will, or (if all the proving executors are dead) the probate which was granted of it; or he may be sworn to a certified office copy under seal of the Will. He will swear to administer generally the estate, and not merely to what remains unadministered, but the amount of the estate as sworn in the oath will be the value of what remains unadministered at the time (*p*).

Sect. 8.—*Of Costs of Proceedings in the Probate Division.*

Costs: Rule of Prerogative Court.

Under the practice of the Prerogative Court and afterwards of the Court of Probate the question of costs was in the discretion of the judge.

Judicature Act, 1890, s. 5.

The Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5, provides that "Subject to the Supreme Court of Judicature Acts and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incidental to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall

(*n*) See *ante*, p. 58.
(*o*) See Williams (10th ed.) 295, 296.
(*p*) See Tr. & Coo. P. P. (14th ed.) p. 154.

have full power to determine by whom and to what extent such costs are to be paid."

On trial by jury.

Ord. LXV., r. 1, R. S. C., 1883, provides that where any action or issue is tried by a jury, the costs shall follow the event unless the judge by whom such action, cause, matter, or issue is tried, or the Court, shall for good cause otherwise order.

Party insisting on proof in solemn form cross-examining witnesses only.

But Ord. XXI., r. 18 (as amended), provides that "the party opposing a Will may with his defence give notice to the party setting up the Will, that he merely insists upon the Will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the Will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the Will" (*q*).

Proceedings for revocation of probate.

A notice given under Ord. XXI., r. 18, does not apply to the case of a party who claims revocation of probate (*r*).

The official solicitor, if appointed guardian *ad litem* to a lunatic defendant in a probate suit, has no greater rights and is in no better position than any other solicitor appearing for a party in a probate suit, except that he will probably be allowed, out of the estate, costs properly incurred in the conduct of the defence (*s*).

Rules for guidance of Court.

Two rules were laid down by Sir J. P. Wilde in *Mitchell* v. *Gard* (*t*) for the future guidance of the Court in probate causes, and have since been followed (*u*).

First, if the cause of litigation takes its origin in the fault of the testator, or those interested in the residue, the costs may be properly paid out of the estate.

Secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the Will

(*q*) See Spicer *v.* Spicer, [1899] P 38, for an instance where it was held the opposition was without reasonable ground.

(*r*) Tomalin *v* Smart, [1904] P. 141.

(*s*) Gill *v.* Gill, [1909] P. 157.

(*t*) (1861) 3 Sw. & Tr. 275.

(*u*) See Williams (10th ed.) 287, and cases cited.

or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

But neither of those principles, which, however, are not exhaustive, justifies a plea of undue influence unless there are reasonable grounds for putting it forward (*x*).

Executor *primâ facie* justified in propounding Will.

Primâ facie, an executor is justified in propounding his testator's Will, yet if it is made to appear that, when propounding it, he must have known that he was attempting to obtain the sanction of the Court to a document which could not be supported, he ought to be condemned in the costs. But if the facts within his knowledge at the time he propounds the Will tend to show eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induced a jury to find that the testator was insane at the date of the Will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the Will is pronounced against (*y*).

Where Will lost through negligence of executor.

Where an executrix through her negligence lost a Will, and propounded, and in most particulars established, the substance of it, she was ordered to pay the costs of the defendants, and was allowed out of the estate only such costs as she would have incurred in proving the original Will in solemn form (*z*).

Successful legatee propounding codicil.

A legatee who has propounded a codicil and succeeded is entitled to the same costs as an executor under similar circumstances (*a*).

Costs of interveners.

There is no definite rule as to the payment of the costs by or to interveners. Each particular case depends on its own circumstances (*b*).

Defendant cited but not appearing.

Where a defendant, who had been cited but had not entered an appearance, had destroyed the Will, the subject

(*x*) Spiers *v.* English, [1907] P. 122.
(*y*) Boughton *v.* Knight, (1873) L. R. 3 P. & D. 64.
(*z*) Burls *v.* Burls, (1868) L. R. 1 P. & D. 472.
(*a*) Wilkinson *v.* Corfield, (1881) 6 P. D. 27.
(*b*) See Williams (10th ed.) 289, 290, and cases referred to.

of proof, the Court condemned her to pay the costs of the suit for propounding the contents of the Will, although she had not appeared (*c*); and a person who had improperly entered a caveat against probate of a Will the validity of which had been previously established was condemned in the costs thereby occasioned (*d*).

Person entering caveat.

Costs ordered out of particular portion of the estate.

By Ord. LXV., r. 14, R. S. C., 1904, in any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what portion or portions of the estate such costs shall be paid, and such costs shall be paid accordingly. Under this rule, in *Harrington* v. *Butt* (*e*), in pronouncing for the Will, the Court ordered the costs of all parties to be paid out of that portion of the residuary estate passing under the Will to four out of six defendants; and in *Dean* v. *Bulmer* (*f*), the Court ordered the costs of both plaintiff and defendant to be charged on and paid out of the corpus of certain real estate devised by the Will to successive life tenants. In the absence of any direction the costs are payable out of the entirety of the estate in due course of administration, and should the personal estate be insufficient the costs of the plaintiffs propounding the Will ordered to be paid "out of the estate" must be borne by the real estate (*g*).

Where no particular direction, costs out of the estate payable in due course of administration.

Sect. 9.—*Of what the Probate is evidence.*

Conclusive upon the factum and validity of Will.

A probate granted by the Probate Division is conclusive evidence that the instrument proved is testamentary according to the law of the country; it is conclusive upon the factum and validity of the Will (*h*).

Only evidence of executor's title.

Without the constat of the Court of Probate no other

(*c*) King *v.* Gillard, (1867) L. R. 1 P. & D. 539.

(*d*) Ratcliffe *v.* Barnes, (1862) 31 L. J. P. & M. 61.

(*e*) [1905] P. 3, note.

(*f*) [1905] P. 1.

(*g*) *Re* Vickerstaff, [1906] 1 Ch. 762.

(*h*) Whicker *v.* Hume, (1858) 7 H. L. C. 124. The Act-book, containing the entry of the Will and probate, is the primary evidence and is admissible without accounting for the non-production of the probate: Cox *v.* Allingham, (1822) Jac. 514.

Court can take notice of the rights of representation to personal estate: and when such Court has by the grant of probate or letters of administration established the right, no other Court can permit it to be gainsaid (*i*), and it must assume that all documents admitted to probate are testamentary documents (*k*).

Not conclusive of collateral matter.

The sentence of the Court of Probate, however, is conclusive only of the right directly determined, and not of any collateral matter which may possibly be collected or inferred from the sentence (*l*); therefore the probate or grant of administration is not conclusive as to the domicil of the testator or intestate (*m*), or of the death of the testator or intestate (*n*), although in the absence of evidence to the contrary it may possibly be admissible as *primâ facie* evidence (*o*).

Moreover, since a judgment is rendered inadmissible in evidence on proof that the Court which pronounced it had no jurisdiction (*p*), the probate or grant of administration may be defeated by showing that the testator or intestate is alive (*q*).

So also it may be shown that the seal of the Court has been forged, or that the probate has been revoked (*r*).

Equity jurisdiction in case of fraud.

Where probate has been obtained of a forged Will, or by fraud on the next-of-kin, equity may interfere by decreeing the wrong-doer to be a trustee in respect of such probate, and to consent to a revocation of it in the Court in which it was granted, without interfering with any jurisdiction (*s*).

(*i*) Att.-Gen. *v.* Partington, (1864) 3 H. & C. 193, 204; and see Williams (10th ed.) 431 *et seq.* Though the Chancery Division may have jurisdiction to recall probate, it is not a jurisdiction which should be exercised: see Pinney *v.* Hunt, (1877) 6 C. D. 98; Bradford *v.* Young, (1884) 26 C. D. 656, 667.

(*k*) *Re* Barrance, [1910] 2 Ch. 419.

(*l*) Williams (10th ed.) 440.

(*m*) Whicker *v.* Hume, *ubi sup.*; Concha *v.* Concha, (1886) 11 App. Cas. 541.

(*n*) Moons *v.* De Bernales, (1826) 1 Russ. 301, 307.

(*o*) See Williams (10th ed.) 440, and Taylor on Evidence (9th ed.) s. 167.

(*p*) Taylor on Evidence (9th ed.) s. 1714.

(*q*) Allen *v.* Dundas, (1789) 3 T. R. 125, 130.

(*r*) Williams (10th ed.) 441.

(*s*) Barnesly *v.* Powell, (1748) 1 Ves. Sen. 119, 289; Williams (10th ed.) 435.

So also where a probate action was compromised and a consent judgment taken establishing the earlier of two Wills, and it was afterwards discovered that the earlier Will was a forgery, in an action in the Chancery Division the forgery was established and the compromise was set aside ; and it was held by the Court of Appeal that although the Chancery Division has no jurisdiction to revoke the probate of the Will it had full jurisdiction to decide that it was a forgery ; and having so decided, in another action in the Probate Division, for revocation of the probate of the earlier Will, the defendants in the probate action, who were parties to the Chancery action, were estopped from denying the forgery (*t*).

Probate is conclusive as to every part of the Will ; therefore no question as to the validity of an interlineation can be entertained by a Court of Equity (*u*).

Probate of Will and codicil conclusive of distinct instruments.

So where probate is granted as of a Will and codicil it is conclusive of the fact of distinct instruments, though written on the same paper ; as for instance on a question arising whether legacies were intended to be cumulative or substituted (*x*).

When original Will may be looked at.

The original Will may be looked at to assist the construction, but not to alter or vary or displace anything determined in the granting of the probate (*y*).

For instance the Court may look at the Will itself in order to derive aid in its construction from the punctuation, or manner of writing (*z*), or from other appearances on the face of it, such as blanks appearing in the probate copy (*a*), and where the question is whether they arose from an accidental omission to fill up a printed form or from an intention not to fill them up (*b*). The practice in this respect is not

(*t*) Priestman *v.* Thomas, (1884) 9 C. D. 70, 210.

(*u*) Plume *v.* Beale, (1717) 1 P. Wms. 388.

(*x*) Baillie *v.* Butterfield, (1787) 1 Cox 392.

(*y*) Williams (10th ed.) 448.

(*z*) Oppenheimer *v.* Henry, (1853) 9 Hare, 802, n.

(*a*) Taylor *v.* Richardson, (1854) 2 Drewry 16.

(*b*) *Re* Harrison, (1885) 30 C. D. 390.

different by reason of the probate having been granted in *fac simile* (*c*).

Court of Construction not bound by a mistake in translation of foreign Will.

In the case of a foreign Will, where an English translation has been proved, and a copy of the Will in the foreign language deposited, as nothing but the original is part of the probate, and the Court of Probate has no power to make a translation, the Court of Construction is not bound by the translation in case of mistake (*d*): although it may be the Court is not entitled to look at the original, if any of the parties object, until the English translation is brought before the Probate Division for the purpose of being corrected (*e*).

As to real estate.

The Ecclesiastical Court and, except as provided by the Court of Probate Act, 1857, the Court of Probate had no jurisdiction to authenticate a Will as far as it related to real estate, consequently the probate was no evidence of the validity or contents of a Will to such property, and not even when the original Will was lost, except as a mere copy (*f*).

Effect of 20 & 21 Vict. c. 77, where heir-at-law, devisee, or other person having or pretending interest is cited.

By the Court of Probate Act, 1857 (s. 61), where proceedings are taken under the Act for proving a Will in solemn form, or for revoking probate of a Will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under the Act the validity of a Will is disputed, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the Will shall be cited, and may be permitted to become parties, or intervene for their respective interests in such real estate, subject to the rules and orders and the discretion of the Court. And (s. 62) where probate is granted after such proof in solemn form, or where the validity of the Will is otherwise declared by the decree or order in such contentious cause or matter, the probate, decree, or order shall enure for

(*c*) Gann *v.* Gregory, (1854) 3 De G. M. & G. 777; Shea *v.* Boschetti, (1854) 18 Beav. 321.

(*d*) L'Fit *v.* L'Batt, (1718) 1 P Wms. 526.

(*e*) *Re* Cliffe's Trusts, [1892] 2 Ch. 229.

(*f*) Williams (10th ed.) 440.

the benefit of all persons interested in the real estate affected by the Will, and shall be received as conclusive evidence of the validity and contents of such Will; and where probate is refused or revoked, on the ground of the invalidity of the Will, or the invalidity of the Will is otherwise declared by decree or order under the Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such Will might operate. Should the Court think fit it may (s. 63) proceed without citing the heir, or other persons interested in the real estate, but the probate, decree, or order of the Court shall not in any case affect the heir, or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

In an action as to the validity of a Will, the Court will not order the assignee of the heir-at-law of the testator to be cited as a person having or pretending interest in the real estate affected by the Will (*g*).

Act only applies to Will executed after and in accordance with Wills Act, 1837.

The above sections are only applicable to Wills which require for their validity the same formularies in respect both of real and personal estate, so that one inquiry upon the validity of the Will shall suffice for both, and therefore they do not apply to a Will made before the Wills Act, 1837 (*h*). The practice as to citations has not been altered by the Judicature Acts (*i*).

Effect of 20 & 21 Vict. c. 77 as to notice of intention to give in evidence probate or letters of administration with the Will annexed.

Under s. 64, in any action where it is necessary for a party to establish a devise or other testamentary disposition of real estate, he may give to the opposite party ten days at least before the trial, or other proceeding, notice of intention to give in evidence the probate of the Will, or the letters of administration with the Will annexed, or a stamped copy thereof, and in such case, if the opposite party do not give a counter-notice within four days that he disputes the validity

(*g*) Jones *v.* Jones, (1882) 7 P. D. 66.
(*h*) Campbell *v.* Lucy, (1871) L. R. 2 P. & D. 209.
(*i*) Kennaway *v.* Kennaway, (1876) 1 P. D. 148.

of such devise or other testamentary disposition, such probate, or letters of administration, or stamped copy thereof, shall be sufficient evidence of the Will and of its validity and contents.

The meaning of this section is that when a notice has been given and no counter-notice is given, the probate, without more, will be admissible evidence of the Will and its contents as to realty, and will be *primâ facie* evidence of the validity of the Will and the competence of the testator ; but there is nothing to prevent the opposite party from showing by evidence that the Will is not valid, or that the testator was not competent (*k*).

Sect. 65 provides that "In every case in which, in any such action or suit, the original Will shall be produced and proved, it shall be lawful for the Court or judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid."

Effect of the Land Transfer Act, 1897.

In the case of death after 31st December, 1897, under s. 1 of the Land Transfer Act, 1897, real estate of the deceased vests in his personal representative, and probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. But real estate under this Act does not include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant. In cases not coming within the operation of this Act it will still be necessary in order to establish a devise of real estate, if the Will has not been proved in solemn form and its validity declared by decree or order so as to fall within s. 62 of the Court of Probate Act, 1857, to produce the original Will and prove its due execution, unless notice has been given and no counter-notice has been received under s. 64 of the same Act, and the validity of the Will is not contested.

Probate merely authenticated evidence, not the

The probate is merely operative as authenticated evidence, and not as the foundation, of the executor's title ; for

(*k*) Barraclough *v.* Greenhough, (1867) L. R. 2 Q. B. 612.

foundation, of the executor's title.

he derives all his interest from the Will itself, and the property of the deceased vests in him from the moment of the testator's death. Consequently the probate is said to have relation to the time of the testator's death (*l*).

(*l*) Williams (10th ed.) 214; *ante*, pp. 1, 71.

CHAPTER VI.

OF INTESTACY AND GRANT OF LETTERS OF ADMINISTRATION.

SECT. 1.—*Origin of and jurisdiction to grant Letters of Administration.*

IN case a person makes no testamentary disposition of the whole or part of his property he is said to die intestate (*a*).

Origin of administrators.

In ancient times the King, as *parens patriæ*, seized the goods of the intestate, to the intent that they should be preserved and disposed of for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and, if not, those of his blood. This prerogative the King continued to exercise for some time by his own ministers of justice, and probably in the County Court, where matters of all kinds were determined; and it was granted as a franchise to many lords of manors, and others, who had, until the passing of the Court of Probate Act, 1857, a prescriptive right to grant administration to their intestate tenants and suitors, in their own Courts Baron and other Courts. Afterwards the Crown invested the Ordinary with this branch of the prerogative. Although the clergy had never by law any beneficial interest in the property of intestates, but merely the right or duty of administration, and the right of possession for the latter purpose, yet it was said they took to themselves the residue of the deceased's estate after the *partes rationabiles* of the wife and children had been deducted, and without even paying his lawful debts and charges thereon, and by stat. Westm. 2 (13 Edw. I. c. 19) it was enacted that the Ordinary should be bound to pay

King's prerogative.

Jurisdiction of the Ordinary.

(*a*) 2 Bl. Com. 494.

the debts of the intestate as far as his goods extended, in the same manner that executors were bound in case the deceased had left a Will. The residuum, however, remained still in his hands to be applied to whatever purposes the conscience of the Ordinary should approve, and to prevent abuses of this power the stat. 31 Edw. III. s. 1, c. 11, was passed, which provides that "In case where a man dieth intestate, the Ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods; which person so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the King's Court, to administer and dispend for the soul of the dead; and shall answer also in the King's Court to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the Ordinaries as executors be in the case of testament, as well of the time past as the time to come."

Administrators were officers of the Ordinary appointed pursuant to 31 Edw. III. st. 1, c. 11.

This is the origin of administrators. They were the officers of the Ordinary appointed by him in pursuance of the statute, and their title and authority were derived exclusively from the ecclesiastical judge, by grants which are usually denominated letters of administration (*b*).

Powers extended by 21 Hen. VIII. c. 5, s. 3.

Stat. 21 Hen. VIII. c. 5, s. 3, extended the power of the Ordinaries under 31 Edw. III. st. 1, c. 11, to grant administration in case of a person dying intestate, or the executors named refusing to prove the Will, to the widow or next-of-kin of the deceased, or to both at discretion, and where divers persons claim the administration as next-of-kin in equal degree of kindred to the testator or person deceased it gave the Ordinary power to elect any one or more making request.

Jurisdiction subsequently transferred to Court of Probate, and now vested in Probate Division.

By s. 3 of the Court of Probate Act, 1857, the jurisdiction of ecclesiastical and other Courts to grant letters of administration was abolished, and by s. 4 became vested in the Court of Probate, and by the Judicature Act, 1873, ss. 3, 16 (6), it is

(*b*) See Williams (10th ed.) 312 *et seq.* for a more complete statement of the origin of administration.

now vested in the Probate Division of the High Court of Justice (*c*).

Sect. 2.—*What may be done before Grant.*

General rule administrator cannot act before grant.

Inasmuch as the administrator derives his authority from the appointment of the Court, as a general rule he cannot act before letters of administration granted to him (*d*).

A release, an assignment, or a surrender by a person who afterwards takes out letters of administration is of no validity, for the right was not in him at the time (*e*) ; so also a notice to be given by the executors or administrators of a deceased partner cannot be effectually given by the administrator before taking out letters of administration (*f*).

To what extent grant relates back.

In Chancery proceedings it would seem that a person having the right to administer is, as to suing, in a similar position to an executor, that is to say, if the grant is made to him before the hearing it will relate back to the death of the intestate (*g*) ; yet notwithstanding s. 25 (1) of the Judicature Act, 1873, it would seem that an administrator cannot commence an ordinary action to recover a debt or damages until the letters of administration have issued (*h*).

In some cases acts of a person who afterwards takes out letters of administration are made good by relation. For instance, in *Kenrick* v. *Burges* (*i*) the Court agreed that if one enters as executor of his wrong, and sells goods and then obtains administration, the sale is good by relation ; and *Sharland* v. *Mildon* (*k*) shows that if, before administration is taken out, an agent is employed, the agency is not lawful so long as the employer is a wrongdoer, but if the employer becomes administrator, then all that has been done is made

(*c*) See *ante*, pp. 75 *et seq.*

(*d*) Wankford *v.* Wankford, (1698) 1 Salk. 299, 301.

(*e*) Williams (10th ed.) 315.

(*f*) Holland *v.* King, (1848) 6 C. B. 727 ; and see Dibbins *v.* Dibbins, [1896] 2 Ch. 348.

(*g*) Humphreys *v.* Humphreys, (1734) 3 P. Wms. 349, 351.

(*h*) Bullen & Leake's Prec. of Plead. (6th ed.) p. 167.

(*i*) (1582) Moo. 126.

(*k*) (1846) 5 Hare 469 ; and see Hill *v.* Curtis, (1865) L. R. 1 Eq. 90, 100.

right. But in such cases the act done must be for the benefit of the estate (*l*).

SECT. 3.—*To whom Administration is to be Granted.*

(1 Right of husband.

The right of the husband to be the administrator of his wife belongs to him exclusively of all other persons, and the Ordinary had no power or election to grant it to any other. It would seem that this claim is founded on the stat. of 31 Edw. III., on the ground of the husband being "the next and most lawful friend" of his wife (*m*). This right was expressly confirmed by stat. 29 Car. II. c. 3, s. 25.

As to separate property of wife.

Although a married woman has the power of disposing by Will of her separate property, yet the quality of separate property ceases on the death of the married woman without making a disposition, and her undisposed of property devolves just as if the separate use had never existed. The Married Women's Property Act, 1882, has not made any alteration in this respect. If she has made a Will appointing executors, they become trustees for her surviving husband of the personal property undisposed of (*n*).

When husband entitled in his marital right.

According to the equitable doctrine of separate use, if the husband survives and the wife dies in actual possession of her separate property without having exercised her right of disposing of it, the fund belongs to the husband in his marital right, so that he need not become her administrator in order

When not so entitled.

to entitle himself to it. It is otherwise under the Married Women's Property Act, 1882, as thereunder the wife takes as a *feme sole*, and the husband surviving, not having taken any legal interest, must obtain a grant of administration. In the latter case the statute defeats the husband's *jus mariti*, and he must take administration to his wife's estate, whereas in the former the quality of separate property ceases on the wife's death, and consequently the right of the husband (the *jus mariti*) subsists as if the separate use had never existed (*o*).

(*l*) Morgan *v.* Thomas, (1853) 17 Jur. 283.

(*m*) Williams (10th ed.) 320.

(*n*) *Re* Lambert's Estate, (1888) 39 C. D. 626.

(*o*) Williams (10th ed.) 521, n. (*y*),

Where marriage voidable.

Though a marriage be voidable by reason of some canonical disability (*e.g.*, on account of corporal infirmities, and formerly as being within the prohibited degrees of consanguinity or affinity), yet the husband is entitled to the administration of the wife, unless sentence of nullity was declared before her death. But where the marriage took place under one of the civil disabilities (such as prior marriage, want of age, idiotcy, and the like, and since 5 & 6 Will. IV. c. 54, by being within the prohibited degrees of consanguinity or affinity) the contract of marriage is absolutely void *ab initio*, and consequently the husband cannot be entitled to take administration (*p*).

Where marriage void *ab initio*.

Where marriage dissolved.

A divorced spouse, whether petitioner or respondent, ceases to have an interest in the estate of the other party to the dissolved marriage who subsequently dies intestate ; and, in such a case, the Court will pass over the surviving spouse without citation, but in granting administration to the next-of-kin, will require the sureties to the administration bond to justify (*q*).

Where wife judicially separated or has obtained protection order.

Where a wife has been judicially separated or has obtained a protection order under stat. 20 & 21 Vict. c. 85, s. 21, and afterwards dies in the lifetime of her husband, intestate, the Court will decree administration, limited to such property as she acquired since the judicial separation or protection order (without specifying of what that property consisted), to the next-of-kin of the wife ; as to the remainder, administration will be granted to the husband (*r*) ; and in making the grant to the next-of-kin it is not necessary that the husband should be cited (*s*).

Where husband is bankrupt.

The right of the husband to administer to his wife's estate is not a right which passes to his trustee in bankruptcy, but under special circumstances the Court may make the grant to the trustee under s. 73 of the Court of Probate Act, 1857,

573, n. (*m*), 655, n. (*r*); Lush on H. & W. (2nd ed.) 148.

(*p*) Williams (10th ed.) 321

(*q*) In the Estate of Wallas, [1905] P. 326.

(*r*) Williams (10th ed.) 321.

(*s*) In the Goods of Brighton, (1865) 34 L. J. (P. M. & A.) 55.

and if the estate is small will dispense with citation on the husband (*t*).

Effect of Land Transfer Act, 1897, on husband's right.

Since the Land Transfer Act, 1897, if a wife dies possessed of real estate the heir-at-law has under the Act (*u*) an equal right to the grant of administration with the next-of-kin. The Act, however, does not refer to the husband, and being entitled to administration *jure mariti*, and not as next-of-kin, he is not affected by the Act, but in a proper case he may be passed over under s. 73 of the Court of Probate Act, 1857 (*x*).

Husband has no right if he has no interest.

The husband is not entitled to the grant if he has no interest in his deceased wife's property. So that where a husband agreed by deed of separation that if his wife died intestate her next-of-kin should be entitled to her property, and she died intestate, leaving separate property of which she had become possessed by virtue of the deed, the Court, notwithstanding the husband objected, granted letters of administration to her father limited to that property (*y*).

Right of personal representative of husband.

If the husband survives his wife and dies, the practice of the Court in all cases where there is only personal estate is to grant to the representative of the husband alone letters of administration to the wife, unless the next-of-kin are entitled by contract or otherwise to the beneficial interest, when it will be decreed to them, because the principle is that the grant ought to follow the interest. But before the husband's next-of-kin can claim to administer to the wife's estate they must constitute themselves his legal personal representatives (*z*).

Heir-at-law of wife has priority if she has left real estate.

Since the passing of the Land Transfer Act, 1897, it would seem that where the wife predeceases the husband leaving real estate the heir-at-law of the wife has priority over the personal representative of the husband (*a*).

(*t*) In the Goods of Turner, (1886) 12 P. D. 18.

(*u*) 60 & 61 Vict. c. 65, Pt. I., s. 2, sub-s. 4.

(*x*) In the Goods of Ardern, [1898] P. 147.

(*y*) Allen *v.* Humphrys, (1882) 8 P. D. 16.

(*z*) Partington *v.* Att.-Gen., (1869) L. R. 4 H. L. 100, 109, 115.

(*a*) In the Goods of Roberts, [1898] P. 149.

(2) Right of widow.

Although the stat. 21 Hen. VIII. c. 5, s. 3, directs the Ordinary at his discretion to grant administration to the widow of the deceased, or to the next-of-kin, or to both, it is the practice of the Court to give priority to the widow, unless good cause is shown to the contrary; for instance, having barred herself of all interest in her husband's property by contract, or marital misconduct (*b*).

Court prefers a sole to a joint administration.

The Court at all times prefers a sole to a joint administration (*c*), and where a joint grant is made to the widow and one of the next-of-kin, all the other next-of-kin must consent that the grant shall be so made; and the Court will not depart from the general practice, unless there are special circumstances for so doing (*d*).

Effect of marital misconduct.

On an application for a grant of administration passing over the widow on the ground of misconduct, the Court requires the widow to be cited to give her the opportunity of answering the charge (*e*), unless there are special circumstances (*f*).

But where a charge of marital misconduct had been established in a suit by the intestate who had obtained a decree *nisi* for the dissolution of his marriage, the Court made the grant to the son without requiring the widow to be cited, but the sureties to the administration bond had to justify in respect of the share of the estate to which the widow might be entitled in order that her interest in the estate might be absolutely protected (*g*).

But the Court will not, without citation, pass over the widow, who has been legally separated from her husband by reason of her cruelty (*h*).

Widow being lunatic.

Where the widow is a lunatic her committee is entitled preferably, in like manner as the widow would be, unless

(*b*) Williams (10th ed.) 327; In the Goods of Stevens, [1898] P. 126.

(*c*) See *post*, p. 117.

(*d*) In the Goods of Newbold, (1866) L. R. 1 P. & D. 285; In the Goods of Richards, (1871) L. R. 2 P. & D. 216; In the Goods of Dickinson, [1891] P. 292.

(*e*) In the Goods of Middleton, (1888) 14 P. D 23.

(*f*) In the Goods of Stevens, *ubi sup.*

(*g*) In the Estate of Frost, [1905] P. 140; as to a divorced spouse, see *ante*, p. 111.

(*h*) In the Goods of Ihler, (1873) L. R. 3 P. & D. 50.

good cause to the contrary is shown by the next-of-kin. If there is no committee of her estate, administration is granted to the widow's next-of-kin, or to the next-of-kin of the husband, according to circumstances, or in cases coming within the Land Transfer Act, 1897, to the heir-at-law, if he is the person principally interested (*i*).

(3) Right of next-of-kin.

Inasmuch as the principle upon which the Court acts is that the grant of administration ought to follow the interest,

Next-of-kin according to Statutes of Distribution entitled.

the decided cases determining who are next-of-kin according to the Statutes of Distribution are authorities upon the question as to who are entitled to administration as being next-of-kin under the Statutes of Administration (*k*).

Consanguinity.

Consanguinity, or the relation of persons descended from the same stock or common ancestor, is either lineal or collateral.

Lineal consanguinity.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between the propositus and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between the propositus and his son, grandson, great grandson, and so downwards in the direct

Mode of calculating.

descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards. The father of the propositus is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second, his great grandsire and great grandson in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil and canon, as in the common law (*l*).

Collateral consanguinity.

Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other (*m*).

(*i*) Williams (10th ed.) 327.
(*k*) See Williams (10th ed.) 328 *et seq.*
(*l*) Williams (10th ed.) 329.
(*m*) *Ibid.*

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next-of-kin, so as to be entitled to administration, conforms to that of the civil law, and is as follows : to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending ; or, in other words, to take the sum of the degrees in both lines to the common ancestor (*n*) ; so that the propositus and his cousin-german or first cousin are related in the fourth degree, and the propositus and his second cousin are related in the sixth degree. Moreover, relations of different denominations may be of equal degree to the propositus. Thus a grand-daughter of the sister, and a daughter of the intestate's aunt (*i.e.*, a great-niece and a first cousin) are in equal degree, being each four degrees removed. Mode of calculating.

The following distinctions may be observed with reference to the corresponding rules of the common law respecting succession to inheritances (*o*).

Relations by the father's side and the mother's side are in equal degree of kindred, and therefore equally entitled to administration. Paternal and maternal relations equally entitled.

The half-blood is admitted to administration as well as the whole. Half-blood.

Primogeniture gives no right to preference in the grant of administration. Primogeniture gives no preference.

The right to administration will follow the proximity of kindred, though ascendant ; and, therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the grant, exclusive of all others. If a child dies intestate without a wife, child or father, the mother is entitled to administration. So the grandfather or grandmother, being in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the third Right to administration follows proximity of kindred.

(*n*) Williams (10th ed.) 330.

(*o*) See Williams (10th ed.) 331, where these distinctions are given and the authorities collected.

degree. So a great-grandmother is equally entitled with an aunt.

Collaterals preferred to more remote lineals.

Our law prefers the next-of-kin, though collateral, before one who, though lineal, is more remote.

Exceptions to rule that all in equal degree equally entitled.

Although, as a general rule, those in equal degree, whether male or female, are equally entitled to administration, yet there is a recognised order of preference among kindred which is an exception to this rule.

Order of preference.

The order of preference is as follows : In the first place the children, and their lineal descendants to the remotest degree ; and on failure of children, the parents of the deceased are entitled to the administration ; then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins (*p*).

(4) Right of heir-at-law.

Under the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2 (4), where a person dies possessed of real estate, in granting letters of administration the heir-at-law if not one of the next-of-kin shall be equally entitled to the grant with the next-of-kin (*q*).

(5) In case of contest parties propound their interests and proceed *pari passu*.

Where two parties contest the right to administration before any grant has been made, both propound their interests and proceed *pari passu* (*r*).

Power of Court to elect where several in equal degree.

Where there are several persons standing in the same degree of kindred to the intestate the Court has under the statute a discretion to accept any one or more of such persons (*s*).

Practice as to election.

Where there is no material objection on one hand, or reasons for preference on the other, the Court, in its discretion, puts the administration into the hands of that person, amongst those of the same kindred, to whom the majority

(*p*) Williams (10th ed.) 333, and see the authorities there collected.

(*q*) Probate Rule, 109 (Nov. 20th, 1897), adapts the procedure and practice in the grant of letters of administration to the case of real estate.

(*r*) Williams (10th ed.) 334 ; as to the practice in interest actions, see Tr. & Coo. P. P. (14th ed.) 330, 363.

(*s*) See P. R. 1862, r. 28, as to notice required to be given to other next-of-kin.

of parties interested are desirous of entrusting the estate (*t*).

Cæteris paribus, by the practice of the Court, preference is given to one of the whole blood over one of the half blood (*u*), to males over females (*x*), to seniority as between brothers (*y*) or sisters (*z*), and to a man accustomed to business (*a*); but such considerations will not weigh against the wish of the majority of interests and are subject to the rule to make the grant to the first applicant (*b*).

The fact of one of several next-of-kin being also a creditor is a reason against his being preferred in a contest for the administration (*c*).

Where there is no contest the Court will make the grant *priori petenti*, *i.e.*, to the first applicant (*d*), but may require notice to be given to the other next-of-kin (*e*). Where no contest.

The Court prefers a sole to a joint administration (*f*). Sole preferred to joint administration.

Where a joint grant is made the Court will not, generally speaking, make the grant to more than three, except in the case of testamentary guardians (*g*). Grant not made to more than three except to testamentary guardians.

When administration has been once committed to any of the next-of-kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant (*h*). Administration once committed others in same degree precluded.

(6) Next-of-kin excluded if he has no interest.

In disregard of the express words of the statutes, but with the view to furthering their object by giving the management of the property to the person who has the beneficial interest in it, the next-of-kin is excluded if he has no interest, for instance, if he has assigned away his interest, and the grant will be made to the party beneficially entitled. So also

(*t*) Williams (10th ed.) 335; and see In the Goods of Stainton, (1871) L. R. 2 P. & D. 212; Sawbridge *v.* Hill, (1871) L. R. 2 P. & D. 219.

(*u*) Stratton *v.* Linton, (1861) 31 L. J. P. M. & A. 48.

(*x*) Cordeux *v.* Trasler, (1865) 4 Sw. & Tr. 51.

(*y*) Warwick *v.* Greville, (1809) 1 Phillim. 125.

(*z*) Coppin *v.* Dillon, (1833) 4 Hagg. 376.

(*a*) Williams *v.* Wilkins, (1812) 2 Phillim. 100.

(*b*) Cordeux *v.* Trasler, *ubi sup.*

(*c*) Webb *v.* Needham, (1823) 1 Add. 494.

(*d*) Cordeux *v.* Trasler, *ubi sup.*

(*e*) P. R. 1862, r. 28.

(*f*) See *ante*, p. 113.

(*g*) Tr. & Coo. P. P. (14th ed.) p. 186.

(*h*) Williams (10th ed.) 337.

with respect to administration *cum testamento annexo*, the grant will be made to the residuary legatee (*i*).

Direct interest preferred to derivative interest.

The general practice is that a party having a direct interest, that is originally entitled in distribution, is preferred to a person having a derivative interest, but the matter is in the discretion of the Court (*k*). Before exercising its discretion in favour of a person having a derivative interest the Court will require the person entitled in distribution to be cited, unless in a particular instance citation is dispensed with (*l*).

(7) Grant to attorney of person entitled residing out of England.

By P. R. 1862, r. 32, "In the case of a person residing out of England administration, or administration with the Will annexed, may be granted to his attorney acting under a power of attorney." Where a person entitled to the grant is resident in this country, and able but unwilling to take it himself, the Court will not make the grant to his attorney for his use and benefit (*m*).

Position of attorney administrator.

Such an administrator is liable to be sued in respect of the estate of the intestate, by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right (*n*). But until he is sued he may hand over the net surplus to the person for whose use and benefit the letters were granted (*o*) without such person taking out letters of administration in this country (*p*). But he cannot obtain a good discharge from his principal where the principal is not legal personal representative in any country, and the attorney is responsible himself for the due distribution of the assets (*q*).

The form of the grant is for the use and benefit of the principal and until he shall duly apply for and obtain letters

(*i*) See Williams (10th ed.) 345 *et seq.*

(*k*) In the Goods of Carr, (1867) L. R. 1 P. & D. 291.

(*l*) In the Goods of Kinchella, [1894] P. 264.

(*m*) In the Goods of Burch, (1861) 2 Sw. & Tr. 139; and see *post*, p. 140, as to grant to attorney of executor *durante absentia*.

(*n*) Chambers *v.* Bicknell, (1843) 2 Hare, 536.

(*o*) Att.-Gen. *v.* Köhler, (1861) 9 H. L. C. 654; Eames *v.* Hacon, (1881) 18 C. D. 347.

(*p*) De la Viesca *v.* Lubbock, (1840) 10 Sim. 629.

(*q*) *Re* Rendell, [1901] 1 Ch. 230.

of administration of the estate to be granted to him (*r*). It ceases on the death of the principal, and the succeeding grant is in the form of letters *de bonis non* (*s*).

(8) Grant to creditor.

By the practice of the Court if none of the next-of-kin will take out administration a creditor may, since he cannot be paid his debt until representation to the deceased is made (*t*), but by the present form of bond he is prevented from preferring his own debt (*u*).

Under special circumstances, where assets require immediate attention, the grant will be made to a creditor, passing over the next-of-kin (if any) under s. 73 of the Court of Probate Act, 1857 (*x*).

Under the same section a grant may be made to a person nominated by Guardians of the Union to whom a pauper lunatic was indebted for maintenance without citing the next-of-kin (*y*).

Practice with regard to assignee of debt.

It is the established practice of the Court to refuse to grant administration as creditor to a person who has bought up a debt after the death of the deceased. But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased who has assigned it, by way of mortgage or otherwise, to the party seeking the grant (*z*), nor with a grant to the trustee in bankruptcy (*a*), or to the assignee from the trustee in bankruptcy of a creditor (*b*).

Surety paying debt of creditor.

A surety who, after the death of the principal, pays off the debt, is, in the case of intestacy, entitled to a grant of letters of administration as a creditor of the intestate debtor (*c*).

Undertaker for funeral expenses.

The Court may grant administration to the undertaker, as creditor for funeral expenses, but such applications are not

(*r*) See Tr. & Coo. P. P. (14th ed.) pp. 99 *et seq.* and p. 891.

(*s*) *Ibid.*, p. 152.

(*t*) Williams (10th ed.) 350; Webb *v.* Needham, (1823) 1 Add. 494; In the Estate of French, [1910] P. 169.

(*u*) See *post*, p. 377.

(*x*) In the Estate of Heerman, [1910] P. 357.

(*y*) In the Goods of Everley, [1892] P. 50.

(*z*) Williams (10th ed.) 353.

(*a*) Downward *v.* Dickinson, (1864) 3 Sw. & Tr. 564.

(*b*) In the Goods of Burdett, (1876) 1 P. D. 427.

(*c*) Williams *v.* Jukes, (1864) 34 L. J. P. M. & A. 60.

favoured, and the Court will not make the grant unless it is informed of the circumstances under which the expenses were incurred, and by whose authority the applicant undertook the funeral (*d*).

(9) Wanting next-of-kin or creditors to take, Court has discretion to make grant to any person.

For want as well of creditors, as of next-of-kin, desirous to take out administration, the Court may grant it to any person at its discretion (*e*).

In a case where the widow and all the next-of-kin and persons entitled in distribution, having been cited, did not appear, the Court made a general grant of administration to the receiver appointed in administration proceedings in Chancery (*f*). And in a case where the widow of the intestate was a lunatic, and his only other next-of-kin, his brother, was unable to furnish qualifying security, and a suit having been instituted in the Chancery Division for administration and a receiver appointed, a grant was made to the receiver (*g*).

Where there were no known relatives, and the Will did not appoint a residuary legatee, having regard to special circumstances, the Court made the grant, with the Will annexed, limited to the estate disposed of by the Will, to a stranger (*h*). So also where the sole next-of-kin of an intestate was lunatic, her committee having renounced, the Court, with the consent of the next-of-kin of the lunatic and approval of the Master in Lunacy made the grant to a stranger in blood (*i*).

Administration *ad colligendum* where next-of-kin or heir-at-law is absent or unknown.

Where it is for the benefit of absent or unknown next-of-kin the Court will grant letters of administration *ad colligendum* with power to dispose of the property or of any portion of it by sale (*k*); and since the Land Transfer Act, 1897, such grants may be made applicable to real estate,

(*d*) Newcombe *v.* Beloe, (1867) L. R. I. P. & D. 314

(*e*) Williams (10th ed.) 354.

(*f*) In the Goods of Mayer, (1873) L. R. 3 P. & D. 39.

(*g*) In the Goods of Moore, [1892] P. 145.

(*h*) In the Goods of Jackson, [1892] P. 257.

(*i*) In the Goods of Hastings, (1877) 4 P. D. 73.

(*k*) In the Goods of Schwerdtfeger, (1876) 1 P. D. 424.

with liberty to let and manage farms till the heir-at-law can be cited (*l*).

(10) Bastard dying intestate without wife or child.

If a bastard die intestate, and without wife or child, the King is entitled to his goods as *ultimus hæres*, not in a fiduciary character but beneficially ; subject nevertheless to the debts of the intestate. Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the Crown, with a reservation as it is said, of a tenth, or other small proportion of the property, and then the Court grants to such appointee the administration (*m*).

Bastard dying partly testate.

When a bastard dies in part intestate the Crown has a right to a *cæterorum* grant, but not to a general grant of administration, and the legatees have a right to a grant with the Will annexed limited to the property disposed of by the Will (*n*).

Effect of the Treasury Solicitor Act, 1876.

By the Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), the Treasury Solicitor is constituted a corporation sole with certain powers and liabilities, and by s. 2 of the Act where the Crown becomes entitled to the personal estate of an intestate, and the Court has power to grant administration to a nominee of the Crown, and the Treasury Solicitor is so nominated, the Court may grant administration for the use of the Crown to the Treasury Solicitor (by his official name) and his successors, or if the warrant so provide, to some person nominated by the Treasury Solicitor.

Effect of the Intestates Estates Act, 1884, as to proceedings.

Under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 2, where the administration of the personal estate of any deceased person is granted to a nominee of the Crown proceedings by or against such nominee are carried on in the same manner in all respects as if the administration had been granted to such nominee as one of the next-of-kin of such deceased person.

As to law of escheat.

Sect. 4 enacts that "from and after the passing of this Act, where a person dies without an heir and intestate in

(*l*) In the Goods of Roberts, [1898] P. 149.

(*m*) Williams (10th ed.) 341.

(*n*) In the Goods of Rhoades, (1866) L. R. 1 P. & D. 119.

respect of any real estate, consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditaments, or of any equitable estate or interest in any corporeal hereditament, whether devised or not devised to trustees by the Will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments."

Effect of the Land Transfer Act, 1897, as to escheat

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not bind the Crown, and, therefore, the legal estate in escheated land does not, under s. 1, vest in the Treasury Solicitor as nominee of the Crown. Accordingly where a widow had died after the commencement of the Act, a bastard and intestate, and entitled to both real and personal estate, a grant was made to the Treasury Solicitor of her personal estate only, as before the Act (*o*).

In *In the Goods of Ball* (*p*), where the sole executrix and universal legatee and devisee had predeceased the testator and the title of the Crown to escheated lands arose, the grant was made to a creditor in the ordinary form—that is, to all the estate which by law devolves to and vests in the legal personal representative of the deceased, leaving the question of law open.

(11) Grant where felon convict entitled.

In the case of a felon convict, since the stat. 33 & 34 Vict. c. 23 (*q*), administration is no longer granted as formerly to a nominee of the Crown, but follows the ordinary course of the law of succession *ab intestato* (*r*); and if the felon convict is sole next-of-kin it would seem the grant should be made to an administrator or interim curator appointed under the Act limited to the period during which the convict shall be subject to the operation of the Act, or to the Public Trustee under s. 2 (1) of the Public Trustee Act, 1906 (*s*).

(*o*) In the Goods of Hartley, [1899] P. 40.
(*p*) (1902) W. N. 226.
(*q*) *Ante*, p. 24.
(*r*) Williams (10th ed.) 345; Tr. & Coo. P. P. (14th ed.) p. 113.
(*s*) See Appendix.

(12) In case of special circumstances.

The Court of Probate Act, 1857, s. 73, provides that "where a person has died or shall die wholly intestate as to his personal estate, or leaving a Will affecting personal estate but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof; but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator upon his giving such security (if any) as the Court shall direct, and every such administration may be limited as the Court shall think fit."

The operation of this section is not restricted to insolvent estates. Insolvency of the estate is only given as an example (*t*). It applies to all cases within the section where there are special circumstances to justify it (*u*); and the Court ought, as far as it can, to use the power conferred on it by this section for the purpose of expediting and rendering

(*t*) In the Goods of Farrands, (1876) 1 P. D. 439.

(*u*) For a list of cases in which the Court has considered that the circumstances warranted the exercise of the power under this section, see Williams (10th ed.) 356, n. (*h*); and see In the Estate of Heerman, [1910] P. 357; In the Estate of Crippen, [1911] P. 108. No person or his representative can obtain or enforce any rights resulting to him from his own crime; In the Estate of Crippen *sup.*; and see Cleaver *v.* The Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147.

as economical as possible the administration of the estates of deceased persons (*x*).

Where the insolvency of the intestate's estate is disputed, and there is any doubt as to the fact, the Court will not exercise the power conferred by this section by passing over a person entitled to the grant (*y*), unless there are also other special circumstances (*z*).

(13) Public Trustee.

Where the intestate's estate is not known or believed to be insolvent, the Public Trustee, under s. 6 (1) of the Public Trustee Act, 1906, is equally entitled with any other person or class of persons to obtain the grant, except that as between the Public Trustee and the widower, widow, or next-of-kin of the deceased, the widower, widow, or next-of-kin shall be preferred, unless for good cause shown to the contrary (*a*).

Sect. 4.—*Citation.*

General rule.

As a general rule, whenever a party has a right to the administration, he must be cited or consent, although he may have no interest in the property, before the Court will make the grant to a third party (*b*).

When dispensed with.

But under s. 73 of the Court of Probate Act, 1857, a grant of administration may be made without citing a person entitled in distribution (*c*); and accordingly in the case of a small estate, the Court dispensed with the citation of the next-of-kin on proof that they had notice of the application (*d*), and also dispensed with citation by advertisement where the estate was small and the next-of-kin had not been heard of for many years; but the applicant for the grant was required to swear he believed himself

(*x*) In the Goods of Grundy, (1868) L. R. 1 P. & D. 459.

(*y*) Hawke *v.* Wedderburne, (1868) L. R. 1 P. & D. 594.

(*z*) In the Goods of Farrands, *ubi sup.*

(*a*) See Appendix.

(*b*) In the Goods of Barker, (1837) 1 Curt. 592. With regard to the practice as to service of citations see Rules 69 and 70, P. R. 1862 (Non-contentious).

(*c*) In the Goods of Kinchella, [1894] P. 264.

(*d*) In the Goods of Teece, [1896] P. 6.

to be sole next-of-kin and the sureties were required to justify (*e*).

Under s. 6 (1) of the Public Trustee Act, 1906, the consent or citation of the Public Trustee is not required.

When the next-of-kin is of unsound mind, the practice is that his next-of-kin must also be cited, in order that they may take administration for his use and benefit if they think proper (*f*).

Next-of-kin of unsound mind.

Sect. 5.—*When the grant may issue.*

By rule 44, P. R. 1862 (non-contentious business) no letters of administration shall issue until after the lapse of fourteen days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars.

Letters not to issue till after 14 days from death without special order.

By rule 45, in every case where probate or administration is for the first time applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars ; and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit.

After three years cause of delay to be certified.

Since 5th February, 1913, every grant of administration shall contain a personal undertaking by the grantee that the letters of administration shall be brought into the Principal Probate Registry upon formal notification being given to the grantee that this is required to be done (*g*).

Undertaking to lodge letters in Registry when required.

Sect. 6.—*Statutory provisions facilitating obtaining or dispensing with grant in certain cases of small estates.*

By the Intestates' Widows and Children Act, 1873 (36 & 37 Vict. c. 52), where the estate of an intestate does not exceed in value £100, his widow or any one or more of his children, should such widow or children respectively reside at

The Intestates' Widows and Children Act, 1873.

(*e*) In the Goods of Reed, (1874) 29 L. T. N. S. 932 ; In the Goods of John Callicott, [1899] P. 189.

(*f*) Windeatt *v.* Sharland, (1871) L. R. 2 P. & D. 217.

(*g*) In the Estate of Heathcote, [1913] P. 42.

a distance exceeding three miles from the probate registry having jurisdiction, may apply to the registrar of the County Court within the district where the intestate had his fixed abode, and the registrar shall obtain for and deliver to the party applying the letters of administration without the payment of any fee for the same.

Extension of the Act to other cases.

By 38 & 39 Vict. c. 27 the provisions of the last mentioned Act were extended to the surviving children of a poor widow who dies intestate ; and by the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 34, to any case where the whole personal estate and effects of a person dying on or after 1st June, 1881, without any deduction for debts or funeral expenses, shall not exceed the value of £300, whoever may be the applicant for representation ; and in any such case, where the estate and effects shall exceed the value of £100, the stamp duty payable on the inventory shall be the fixed duty of 30*s*., and (s. 36) the payment of the 30*s*. for the fixed duty shall be deemed to be in full satisfaction of any claim to legacy or succession duty.

Public Trustee Act, 1906.

The Public Trustee Act, 1906, authorises the Public Trustee to act in the administration of estates of small value (*h*).

Naval assets.

Stat. 28 & 29 Vict. c. 111 as extended by 47 & 48 Vict. c. 44, and amended by 60 Vict. c. 15, and the Order in Council of December 28, 1865, make provision for the disposal by the Admiralty of naval assets, or sums due by the Admiralty, on the death of any officer, seaman, or marine, or other person employed in dockyards, or naval establishment, or in any of the civil departments of the Navy, or entitled to allowance, gratuity, or pension, and in case of sums under £100 no representation to the deceased is necessary, and the Admiralty is given power to dispose thereof in manner prescribed by the Act and Order in Council.

Wages and property of merchant seamen.

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 176, the wages and property of merchant seamen or apprentices, not exceeding in value £100, subject to the provisions

(*h*) See Appendix.

thereinafter contained and to such deductions as the Board of Trade think proper to allow, may be paid over by the Board of Trade to the persons entitled as therein mentioned, without representation being obtained. And by s. 178 provision is made for payment by the Board of Trade of just claims by creditors.

Deposits in savings banks for seamen.

Stat. 19 & 20 Vict. c. 41, s. 5, made similar provision relating to deposits in savings banks for seamen established under the Act.

Pension or prize money of deceased seamen.

Stat. 11 Geo. IV. and 1 Will. IV. c. 41, s. 5 (as amended by 26 & 27 Vict. c. 57, s. 3, and 31 & 32 Vict. c. 90, s. 2), provides for payment by the Commissioners of the Chelsea Hospital of any pension or prize money not exceeding £100 without administration or probate.

Prize money of deceased soldiers.

Stats. 2 & 3 Will. IV. c. 53, 27 & 28 Vict. c. 36, and 31 & 32 Vict. c. 90, s. 2, make similar provision relating to the payment of prize money of deceased soldiers.

Effects of officers and soldiers not exceeding £100.

Stats. 26 & 27 Vict. c. 57, s. 15, and 47 & 48 Vict. c. 55, s. 4, make provision for payment of the residue of the personal estate of officers and soldiers where it does not exceed £100 without any representation being taken out to them ; and by s. 16 of the former Act provision is made for the disposal of such residue after the expiration of three months in the case of an officer and one month in the case of a soldier.

Civil pay, superannuation or other allowances not exceeding £100.

Stat. 50 & 51 Vict. c. 67, s. 8, provides that sums not exceeding £100 due from a public department in respect of any civil pay, superannuation, or other allowance, annuity or gratuity to any deceased person may, if the prescribed public department so direct, but subject to any regulations made by the Treasury, pay over the same as there directed without representation obtained.

Sums not exceeding £50 due from Loan Society.

By 3 & 4 Vict. c. 110, s. 11, in the case of the intestacy of a debenture holder, depositor or other claimant entitled to receive any sum not exceeding £50 out of the funds of a Loan Society, entitled to the benefit of the Act, the same may be paid as provided without representation obtained.

Sums not exceeding £50 due from Building Society.

By 37 & 38 Vict. c. 42, s. 29, in the case of Building Societies under the Act, a sum not exceeding £50 due to any member or depositor who dies intestate may be paid as provided without representation obtained; and similarly having regard to s. 7, in the case of Building Societies still governed by 6 & 7 Will. IV. c. 32, sums not exceeding £20 may be paid over.

Nominations not exceeding £100 by depositors in Trustee or Post Office Savings Banks;

In the case of depositors in Trustee or Post Office Savings Banks, it is provided by the regulations made in accordance with 50 & 51 Vict. c. 40, s. 3, for the nomination by depositors not being under sixteen years of age, of any person to whom any sum, not exceeding in the aggregate £100 payable to such depositor at his decease, is to be paid at such decease, and, in the absence of nomination, for the payment without representation obtained to the persons and in the manner specified by the regulations (*i*). Similar provisions for nomination or payment of sums not exceeding £100 without representation obtained have been made in the case of members of Friendly Societies by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 58; in the case of members of registered Trade Unions by 39 & 40 Vict. c. 22, s. 10, as amended by 59 & 60 Vict. c. 25; and in the case of members of Industrial and Provident Societies by the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 27 (*k*).

or by members of Friendly Societies;

or Trade Unions;

or Industrial and Provident Societies.

Fund in Court where total assets do not exceed £100.

By Ord. 22, r. 18A of R. S. C., July, 1902, "Where the estate of a deceased person who has died intestate is entitled to a fund or to a share of a fund in Court not exceeding £100, and it is proved to the satisfaction of the Court or a judge that no administration has been taken out to such deceased person, and that his assets do not exceed the value of £100, including the amount of the fund or share to which the estate

(*i*) See further as to the Acts above referred to, Williams (10th ed.) 363 *et seq.* Consols purchased through the Post Office with cash withdrawn from deposit account do not pass as money standing to credit at the Post Office Savings Bank: *Re* Mann, [1912] 1 Ch. 388.

(*k*) The limitation of the amount is referable to the time of nomination and not of death; Griffiths *v.* Eccles Provident Industrial Co-operative Society, Ltd., [1911] 2 K. B. 275.

of such deceased person is entitled, the Court or a judge may direct that such fund or share of a fund shall be paid, transferred, or delivered to the person who, being a widower, widow, child, father, mother, brother, or sister of the deceased, would be entitled to take out administration to the estate of such deceased person." Prior to this rule, and under the old practice, the Court would distribute a share of residue under £20 without requiring administration to be taken out (*l*).

By the Supreme Court Funds Rules, 1905, r. 62, similar provision is made where funds in Court are by order directed to be paid to a person named in the order, who subsequently dies.

SECT. 7.—*Of what the grant is evidence.*

Conclusive as to the right of representation:

A grant of letters of administration, as in the case of probate (*m*), is conclusive until revoked as to the right of representation, and where administration purports to be granted to a person as next-of-kin, and it should subsequently appear that he was not the next-of-kin, application must be made to the Probate Division to revoke its grant, but until revoked the grant is binding on every other Court (*n*).

also that person to whom grant is made is the next-of-kin.

Moreover, if after citation and upon hearing the parties the Probate Division has determined that the person to whom the grant was made was the next-of-kin, that question cannot be re-opened in any other division of the High Court (*o*).

(*l*) Frogley *v.* Phillips, (1901) W. N. 243.

(*m*) *Ante*, p. 100.

(*n*) *Re* Ivory, (1878) 10 C. D. 372.

(*o*) *Ibid.*, per Lush, J., at p. 375.

CHAPTER VII.

OF SPECIAL AND LIMITED ADMINISTRATIONS.

SECT. 1.—*Administration cum testamento annexo.*

THIS arises where the deceased has left a Will without appointing an executor or the appointment of executor fails.

The appointment of executor fails—

When appointment of executor fails.

(1) Where he is incapable of acting, or refuses to act and renounces, or does not appear to a citation served on him (*a*) ;

(2) Where he dies before the testator or before proving the Will. Even if the executor acts, but dies before probate, the chain of representation is broken, and administration with the Will annexed must be granted (*b*) ;

(3) Where after proving and being sole or sole surviving executor he dies intestate before fully administering.

Interval of no appointment.

Wherever there is a Will but there is a mesne time during which there is either no executor appointed or no executor capable of acting, a grant of administration with the Will annexed must be obtained in the meantime (*c*).

Will to be proved as though probate were taken.

The Will to which the administration is annexed must be similarly proved as though probate were taken by an executor (*d*).

Practice to make grant to person having the greatest interest.

Inasmuch as in many cases a grant *cum testamento annexo* is not within the stat. 21 Hen. VIII. c. 5, the Court in such cases can exercise its discretion as to whom the grant should be made, and the practice is to make the grant to the person having the greatest interest, in the absence of special circum-

(*a*) Garrard *v.* Garrard, (1871) L. R. 2 P. & D. 238.

(*b*) Williams (10th ed.) 227 ; and see *post*, p. 133.

(*c*) Graysbrook *v.* Fox, (1564) 1 Plowd. 279.

(*d*) See Tr. & Coo. P. P. (14th ed.) p. 61.

Where several equally interested rules as in general grants apply.

stances (*e*). And where there are several equally interested the general rule is to make the grant to the nominee of the majority as in ordinary general grants (*f*), but any one may take without the consent of or notice to the others (*g*).

Preference of residuary legatee.

In practice the residuary legatee, even when there is no present prospect of any residue, is entitled to the grant in preference as well to the next-of-kin, as also to legatees and annuitants. He is entitled, though only residuary legatee in trust, but where the residuary legatee is a mere trustee, without any beneficial interest, it is the ordinary rule of practice, in the absence of special circumstances, upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate (*h*).

The residuary legatee, however, has no legal right to the grant under the statute, and therefore the Court may exercise its discretion (*i*).

Case of residuary bequest to a convent.

In *In the Goods of McAuliffe* (*k*) a testatrix bequeathed the residue of her property to A. B. " to be disposed of as she shall think fit at her discretion for the benefit of " a Roman Catholic convent. The executor of the Will and A. B. having died during the lifetime of the testatrix, the Court made a grant of administration with the Will annexed to the reverend mother of the convent as residuary legatee, on proof of the permanence of the institution and of the fitness of the reverend mother, having regard to her powers, to receive and apply the legacy, on the ground that if the Court is satisfied that the fund will be safely applied it is a fair exercise of its discretion, and is justified in allowing it to be paid over without the necessity of an application to the Chancery Division for a scheme.

Residuary legatee being also next-of-kin.

But where the same person is both next-of-kin and residuary legatee, neither law nor practice, in the absence

(*e*) Williams (10th ed.) 371; In the Goods of Homan, (1884) 9 P. D. 61.

(*f*) In the Goods of Stainton, (1871) L. R. 2 P. & D. 212; *ante*, p. 116.

(*g*) Tr. & Coo. P. P. (14th ed.) p. 57.

(*h*) Williams (10th ed.) 372, 374.

(*i*) In the Goods of Ewing, (1881) 6 P. D. 19, 24.

(*k*) [1895] P. 290.

of special circumstances, will warrant a refusal to grant administration to him (*l*).

Citation before making grant.

Before administration with the Will annexed is granted to a person in whose favour the disposition is made, it is the practice to cite the next-of-kin (*m*), and now since the Land Transfer Act, 1897, the heir-at-law also.

Inasmuch as a residuary legatee and a residuary devisee are equally entitled to the grant, the one should be cleared off by citation before a grant is made to the other (*n*).

Sect. 2.—*Administration de bonis non.*

Upon death of sole administrator or survivor of two administrators.

Upon the death of a sole administrator, or of the survivor of two administrators, in order to effect a representation to the intestate, the Court must appoint an administrator *de bonis non ;* for on the death of the administrator no authority can be transmitted by him to his executor or administrator, but it results to the Court to appoint another officer (*o*).

Upon death intestate, after probate, of sole executor or survivor of two executors.

Where probate has been granted and the executor who has proved or, if more than one prove, the survivor dies without having fully administered, if owing to his intestacy or otherwise the representation is not transmitted to any executor of his, administration *de bonis non,* that is, of the goods of the original testator left unadministered, becomes necessary (*p*).

Effect of executor having acted and dying before probate.

If the executor having survived his testator should die before probate, but after having acted, the grant will be an immediate grant and not *de bonis non,* since although the acts of the deceased executor are good, the administering is an act *in pais,* of which the Spiritual Court could not take notice (*q*).

Where the Will of the original testator is proved abroad

(*l*) Linthwaite *v.* Galloway, (1757) 2 Lee, 414.

(*m*) Williams (10th ed.) 376.

(*n*) See Tr. & Coo. P. P. (14th ed.) p. 58.

(*o*) Williams (10th ed.) 382.

(*p*) See Williams (10th ed.) 379 *et seq.*

(*q*) Wankford *v.* Wankford, (1698) 1 Salk. 299, 308 ; Williams (10th ed.) 379.

and the executor dies without proving the Will here, his executor does not represent the original testator and administration here must be obtained (*r*).

The grant should follow the interest.

In the grant of administration, the principle that the grant ought to follow the interest applies equally to a *de bonis non* administration as to an original administration, where there are no special circumstances (*s*).

Limited Administrations.

Particular time, or specified subject matter.

Limited administrations may be restricted to a particular extent of time, or to a specified subject matter.

Consent, renunciation or citation of person entitled to general grant.

By rule 29, P. R., 1862, "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge."

Person entitled to general grant not allowed limited grant except by direction of judge.

By rule 30, "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the judge." (*t*).

Renunciation in one character precludes taking grant in another;

By rule 50, "No person who renounces probate of a Will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character."

but rule capable of modification.

This rule is capable of modification by the Court on sufficient reason being shown (*u*). But if the applicant is entitled to a general grant, the Court will not make a grant to him with the Will annexed limited to an appointed fund merely because he is apprehensive of being harassed with actions by creditors of the deceased (*x*).

(*r*) In the Goods of Gaynor, (1869) L. R. 1 P. & D. 723.

(*s*) Williams (10th ed.) 382 *et seq.*

(*t*) See In the Estate of Von Brentano, [1911] P. 172, where there were two Wills, a grant limited to realty in England was made to English executors and a *cæterorum* grant to the foreign executor.

(*u*) In the Goods of Loftus, (1864) 3 Sw. & Tr. 307; *ante*, p. 63.

(*x*) In the Goods of Somerset, (1867) L. R. 1 P. & D. 350; and see *post*, p. 147.

SECT. 3.—*Administration durante minore ætate.*

Person appointed sole executor or person having right to administration being under age.

When the person appointed sole executor under the Will, or the person to whom, in the case of an intestacy, the right to administration devolves is under age, administration *durante minore ætate* must be granted (*y*).

Formerly an infant executor was considered capable of the office on attaining the age of seventeen years, but stat. 38 Geo. III. c. 87, s. 6, enacts, "That where an infant is sole executor, administration with the Will annexed shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the Will shall be granted to him."

Several executors and one of age willing to act.

If there are several executors and one is of full age and willing to execute the Will no administration of this kind ought to be granted, since there is no necessity for it (*z*).

Several next-of-kin and the interest of minors preponderate.

But in the case of several next-of-kin in equal degree, entitled under an intestacy, if the interest of those under age preponderate, administration *durante minore ætate* will be granted to their guardian (*a*).

Grant discretionary in Court.

Practice to make grant to guardian.

This sort of administration not being within the stat. 21 Hen. VIII. c. 5, it is discretionary in the Court to grant it to such person as it shall think fit. In the exercise of this discretion it is the practice of the Court to grant the administration to the guardian (*b*).

Joint guardians.

Where joint guardians have been appointed by the Court of Chancery to a minor, administration for his benefit cannot properly be granted to one of them only ; but under special circumstances, and by authority of s. 73 of 20 & 21 Vict. c. 77, the Court will permit this to be done ; and where the guardianship of the person is distinguished from the guardianship of the estate preference is given to the latter (*c*).

(*y*) See Williams (10th ed.) 386 *et seq.*

(*z*) Williams (10th ed.) 386.

(*a*) *Ibid.*

(*b*) *Ibid.;* In the Goods of Gardiner, (1884) 9 P. D. 66.

(*c*) In the Goods of Murphy, (1859) 5 Jur. N. S. Pt. 1, 416.

As to appointment of guardian: distinction between infant and minor.

With respect to the appointment of guardian there is a distinction between an infant, that is, a person under seven years of age, and a minor, that is, a person between the age of seven and twenty-one years. The Court *ex officio* assigns a guardian to an infant; the minor himself may nominate his guardian, who is then admitted in that character by the judge, but if the minor makes an improper choice the Court will control it (*d*).

Who will be appointed.

According to the practice the guardianship is granted to the next-of-kin of the child, unless sufficient objection to him is shown. The father of the infant has therefore the best right to be appointed, and is as a general rule preferred by the Court, and in the absence of reason to the contrary, the grant of administration for the use of the infant or minor is made to him. If the father is not living, the guardian, if any, appointed by the father's deed or Will, under 12 Car. II. c. 24, is preferred to a guardian elected by the child (*e*).

Effect of Guardianship of Infants Act, 1886.

By s. 2 of The Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), on the death of the father of an infant, the mother, if surviving, shall be the guardian of such infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians so appointed should be dead or refuse to act, the Court may appoint a guardian or guardians to act jointly with the mother.

By s. 3 (1) the mother of any infant may by deed or Will appoint a guardian or guardians after the death of herself and the father; and where guardians are appointed by both parents they shall act jointly.

By s. 4, every guardian under the Act is to have all the powers of a guardian appointed under the Act of 12 Car. II. c. 24.

It would seem that no election or assignment of the mother of the minor or infant as guardian to take or re-

(*d*) Williams (10th ed.) 388.

(*e*) Williams (10th ed.) 388; In the Goods of Morris, (1862) 2 Sw. & Tr. 360.

nounce a grant is necessary, but she is required to file a declaration (*f*).

Mode of assigning guardian.

By rule 34 of P. R., 1862, "In cases of infants (*i.e.*, under the age of seven years) not having a testamentary guardian, or a guardian appointed by the High Court of Chancery, a guardian must be assigned by order of the judge or of one of the registrars; the registrar's order is to be founded on an affidavit showing that the proposed guardian is either *de facto* next-of-kin of the infants, or that their next-of-kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship."

Where there are both minors and infants.

By rule 35, "Where there are both minors and infants, the guardian elected by the minors may act for the infants without being specially assigned to them by order of the judge or a registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar."

Wife being a minor.

If a wife be the only next-of-kin, and a minor, she may elect her husband her guardian to take the administration for her use and benefit during her minority (*g*).

Effect of marriage of female minor after grant.

It would seem to be the better opinion that if administration is committed during the minority of an executrix and she takes husband of full age the administration does not cease (*h*).

Effect of coming of age of one of several minors.

If administration is granted during the minority of several infants it determines upon the coming of age of any one of them (*i*).

Effect of death of one of several minors.

If administration is granted during the minority of several infants one of whom dies before he comes of age, this will not determine the administration (*k*).

Liability of administrator to account:

When the administration determines the administrator

(*f*) Tr. & Coo. P. P. (14th ed.) p. 103; and see P. R. 1862, r. 36

(*g*) Williams (10th ed.) 388.

(*h*) Williams (10th ed.) 392.

(*i*) *Ibid.*

(*k*) *Ibid.*

to subsequent administrator;

durante minore ætate may be called to account by the executor or by a subsequent administrator (*l*), but he could demur to an action brought against him without either the executor or administrator being made a party (*m*).

to infant at full age.

It is said that if an administrator *durante minore ætate* be repealed, and another made administrator *durante minore ætate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release, shall not be any bar to it (*n*).

Powers of administrator.

While the minority lasts the administrator *durante minore ætate* has all the powers of an ordinary administrator (*o*).

Administrator *d. m. æ.* of executor of an executor is representative of first testator.

Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante minore ætate* of the executor of an executor is *in loco executoris*, and the representative of the first testator (*p*).

Sect. 4.—*Administration durante absentiâ.*

Power of the Ecclesiastical Courts.

If the executor named in the Will, or the next-of-kin, be out of the kingdom, the Ecclesiastical Courts always had power, before probate obtained, or letters of administration issued, of granting to another a limited administration *durante absentiâ* (*q*). But when probate was once granted, and the executor had gone abroad, the Ecclesiastical Courts did not feel themselves authorised to grant new administration on the ground that the executor had left the kingdom.

Effect of 38 Geo. III. c. 87.

To remedy the consequent inconvenience, 38 Geo. III. c. 87, s. 1, enacted that at the expiration of twelve months from the death of any testator (*r*), if the executors or

(*l*) Fotherby *v.* Pate, (1747) 3 Atk. 603; Taylor *v.* Newton, (1752) 1 Lee 15.

(*m*) Fotherby *v.* Pate, *ubi sup.*

(*n*) Williams (10th ed.) 396; but cf. *post*, p. 249.

(*o*) *Re* Cope, (1880) 16 C. D. 49; but see *Re* Thompson and McWilliams' Contract, [1896] 1 Ir. R. 356.

(*p*) Williams (10th ed.) 397.

(*q*) See In the Goods of Suarez, [1897] P. 82.

(*r*) These words mean at or after the expiration of the period: In the Goods of Ruddy, (1872) L. R. 2 P. & D. 330.

executor to whom probate shall have been granted should reside out of the jurisdiction, the Court might, on the application of any creditor, next-of-kin, or legatee, grant special administration limited for the purpose of proceedings in equity and to carry the decrees of the Court into effect.

Effect of Court of Probate Act, 1858.

By 21 & 22 Vict. c. 95, s. 18, the provisions of the Act of Geo. III. were extended to all executors or administrators residing out of the jurisdiction, whether it be or be not intended to institute procedings in the Court of Chancery (*s*).

These sections apply to the case of an executor's executor (*t*).

Powers of administrator.

During the continuance of the administration the administrator *durante absentiâ* has all the powers of an ordinary administrator, but since he cannot warrant to a purchaser that his principal is alive on his execution of a conveyance, he cannot obtain a decree for specific performance against a purchaser of land (*u*).

To whom grant may be made.

Although in the Act 38 Geo. III. c. 87, reference is made to the application of any creditor, next-of-kin, or legatee, yet in *In the Goods of Collier* (*x*), the Court made a limited grant to the personal representative of a legatee; and in *In the Goods of Campion* (*y*), to the nominee of a limited company as assignee of the residuary legatee.

When grant is still limited to proceedings in Chancery.

Where the applicant is residuary legatee, but it is uncertain whether there will be any residue, the grant will be

(*s*) See Williams (10th ed.) 403 *et seq.* In In the Estate of Ellen Saker, [1909] P. 233, a grant *de bonis non* was made to one of the next-of-kin upon her affidavit that she believed the original administrator (her brother) to be dead or beyond the seas; and in In the Estate of French, [1910] P. 169, the original grant was revoked and a fresh grant made at the instance of a creditor; and see In the Estate of Thomas, [1912] P. 177, where the grant was revoked and a fresh grant *de bonis non* was made without notice to the administrator and without requiring production of the original grant.

(*t*) In the Goods of Grant, (1876) 1 P. D. 435.

(*u*) Webb *v.* Kirby, (1857) 3 Sm. & G. 333, and on app. 7 De G. M. & G. 376; and cf. *Re* Cope, (1880) 16 C. D. 49.

(*x*) (1862) 2 Sw. & Tr. 444.

(*y*) [1900] P. 13.

made under 38 Geo. III. c. 87, to enable the applicant to become a party to Chancery proceedings, and not under s. 18 of 21 & 22 Vict. c. 95 (*z*).

When grant ceases.

If, in the exercise of its ordinary jurisdiction, the Court granted administration simply during the absence of an executor, or next-of-kin, the authority of the administrator would be at an end the moment he returned (*a*), although payment to such administrator of a debt without notice of the executor's return might be a good payment (*b*) ; but the form of the grant is now " and until the executor (or the party entitled to the administration) should duly apply for and obtain probate (or administration) " (*c*). Where the administration is for a limited purpose under the Act 38 Geo. III. c. 87, as long as any of the purposes of the decree in equity are to be carried into effect, and until the executor is substituted, the administration is kept on foot, and on the executor being substituted the administrator may require the accounts of his administration to be taken and his costs provided for and be discharged (*d*). Under P. R., 1862, r. 75, no person can sue or act as executor until the administration is recalled or revoked.

Grant to attorney of absent executor.

When the executor resides out of the jurisdiction administration *cum testamento annexo* may be granted to another person under a letter of attorney from the executor for his use and benefit (*e*). A power of attorney in general terms executed by the executor on going abroad before the death of the testator may be sufficient (*f*). The letter of attorney is revocable ; and when the executor revokes it and desires probate, the Court is bound to grant it to him (*g*).

(*z*) In the Goods of Ruddy, (1872) L. R. 2 P. & D. 330.

(*a*) Taynton *v.* Hannay, (1802) 3 Bos. *v.* Pull. 26 ; see also S. C. 7 Ves. 460.

(*b*) Clave *v.* Hedges, cited from MS. in Walker *v.* Woolaston, (1731) 2 P. Wms. 579.

(*c*) See In the Goods of Cassidy, (1832) 4 Hagg. 360.

(*d*) Taynton *v.* Hannay, *ubi sup.*

(*e*) Williams (10th ed.) 377 ; In the Goods of Barker, [1891] P. 251 ; and see Tr. & Coo. P. P. (14th ed.) p. 99 *et seq.* ; and see *ante*, p. 118, as to grant of administration to attorney of next-of-kin.

(*f*) In the Goods of Barker, *ubi sup.*

(*g*) Pipon *v.* Wallis, (1753) 1 Lee 402.

And on the death of the executor the letters of administration cease to be of any force (*h*).

A grant to an attorney of an executor does not break the chain of representation, as a Will proved by an attorney of an executor is the same thing as if actually proved by the executor himself (*i*).

Grant to attorney of executor continues chain of representation.

Sect. 5.—*Administration pendente lite.*

The Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 70, enacts that "pending any suit touching the validity of the Will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the Court and act under its direction."

Effect of Court of Probate Act, 1857.

Rights and powers of administrator.

The Court has no power to order debts to be paid, but it has power under this section to appoint an administrator pending litigation who can pay them (*k*); and such an administrator may, without any leave of the Court, be sued in the Chancery Division by a creditor of the deceased in the same way as a general administrator (*l*).

If an order for administration is made by the Chancery Division, the Probate Division will not exercise its power under s. 70 to control and make orders upon the administrator *pendente lite*, but will leave the administrator to act under the orders of the Court in the administration action (*m*).

Sect. 71 provides that "it shall be lawful for the Court of Probate to appoint any administrator appointed as aforesaid,

Power to appoint administrator

(*h*) Webb *v.* Kirby, (1857) 7 De G. M. & G. 376.

(*i*) In the Goods of Bayard, (1849) 1 Robert. 768; In the Goods of Murguia, (1884) 9 P. D. 236.

(*k*) See per Ld. Penzance in Tichborne *v.* Tichborne, (1869) L. R. 1 P. & D. 730.

(*l*) *Re* Toleman, [1897] 1 Ch. 866.

(*m*) Tichborne *v.* Tichborne, (1870) L. R. 2 P. & D. 41.

receiver of rents of real estate with power to let and manage.

or any other person, to be receiver of the real estate of any deceased person pending any suit in the Court touching the validity of any Will of such deceased person by which his real estate may be affected ; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate as the Court may direct " (*n*).

The duties of an administrator and receiver *pendente lite* commence from the order of appointment, and, if the decree pronouncing against the Will is appealed from the appeal operates as an extension of the suit, and his duties do not cease until the appeal has been disposed of (*o*). The functions of an administrator *pendente lite* terminate with a decree pronouncing in favour of a Will with executors, and do not continue until the executors obtain probate ; and it would seem the case is not altered if there are no executors, since in that case the estate vests in the Court, subject to the right of the person entitled to administration to apply for it (*p*).

Duration of office.

By stat. 21 & 22 Vict. c. 95, s. 22, " all the provisions contained in the Court of Probate Act, respecting grants of administration pending suit, shall be deemed to apply to the case of appeals to the House of Lords under the said Act " (*q*).

Court must be satisfied of necessity of appointment.

The Court will not appoint an administrator *pendente lite* unless satisfied of the necessity for the appointment, as where there is no one who is legally entitled to represent or to take possession of the deceased's property and it is requisite to bring actions, or make demands, or pay debts, but such an appointment will not be made merely to represent the interests of the deceased in a partnership business (*r*).

(*n*) There is no jurisdiction under s. 71 where the litigation is as to the individual appointed executor and not as to the validity of the Will : Grant *v.* Grant, (1869) L. R. 1 P. & D. 654.

(*o*) Taylor *v.* Taylor, (1881) 6 P. D. 29.

(*p*) Wieland *v.* Bird, [1894] P. 262.

(*q*) See Wright *v.* Rogers, (1870) L. R. 2 P. & D. 179.

(*r*) Horrell *v.* Witts, (1866) L. R. 1 P. & D. 103 ; and see Tichborne *v.* Tichborne, (1869) L. R. 1 P. & D 730.

Application of person not a party to the suit.

The Court has power under s. 70 to appoint an administrator *pendente lite* in contested testamentary and administration suits on the application of a person who is not a party to such suit (*s*).

On appointment Chancery Division will discharge any order made appointing receiver.

On the appointment by the Probate Division of an administrator *pendente lite* the Chancery Division will discharge any order it may have made appointing a receiver and will allow the administrator to receive the estate, making such orders upon him as it may think proper (*t*).

When application to Chancery Division to appoint receiver can be made.

The Chancery Division will not appoint a receiver in administration proceedings to do that which the administrator *pendente lite* can do (*u*).

If there is a *lis pendens* in the Probate Division the proper course is to apply to that Court ; but if there is no *lis pendens* in the Probate Division that Court has no jurisdiction to appoint a receiver and the application should be made to the Chancery Division, if the assets are in danger, pending probate or grant of letters of administration : but the proper person entitled to the grant should be before the Court on the application (*x*). Upon the grant being made the receiver should be discharged and the costs disposed of and all further proceedings stayed (*y*).

Under similar circumstances the Chancery Division will appoint a receiver *pendente lite* of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession (*z*).

Caveat proceedings, which terminate by appearance, do not constitute a *lis pendens* or furnish any mode of approaching the Probate Court (*a*).

An application for the appointment of a receiver pending probate should not be made to the Chancery Division except

(*s*) Tichborne *v.* Tichborne, *ubi sup.* ; In the Goods of Evans, (1890) 15 P. D. 215 ; In the Estate of Cleaver, [1905] P. 319.

(*t*) Tichborne *v.* Tichborne, *ubi sup.*

(*u*) Veret *v.* Duprez, (1868) L. R. 6 Eq. 329 ; Hitchen *v.* Birks, (1870) L. R. 10 Eq. 471.

(*x*) *Re* Henderson, (1885) 2 T. L. R. 322 ; *Re* Parker, (1885) 54 L. J. Ch. 694 ; *Re* Green, (1895) W. N. 69.

(*y*) Barton *v.* Rock, (1856) 22 Beav. 376.

(*z*) Parker *v.* Seddons, (1870) L. R. 16 Eq. 34.

(*a*) Salter *v.* Salter, [1896] P. 291.

there are special circumstances, such as danger to assets requiring the appointment (*b*).

Where an executor had before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the Probate Court gave leave to the co-executor to issue a writ in the Probate Division against him, claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver (*c*).

To whom administration *pendente lite* will be granted.

It is the practice of the Court to decline putting a litigant party in possession of the property, by granting administration pending suit to him ; always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties (*d*). But where the plaintiffs in an action in the Probate Division had been appointed receivers in a creditor's action for administration in the Chancery Division the Court appointed them administrators *pendente lite* (*e*).

Allowance of remuneration.

Under s. 72 of 20 & 21 Vict. c. 77, the Probate Division may allow to administrators and receivers appointed pending suits reasonable remuneration out of the personal and real estate of the deceased.

Sect. 6.—*Administration ad colligenda bona.*

Object of grant.

Such grants are usually made for the purpose of protecting the estate pending delay in making a general grant, and where the necessity of the case requires an immediate grant. The grant may be made to a stranger connected with the deceased's affairs (*f*).

Powers of administrator.

Before the Court of Probate Act, 1857, an administrator *ad colligenda bona* was practically in the position of a receiver merely. Now under s. 73 of that Act the Court has power to make a grant of partial administration to a temporary

(*b*) *Re* Parker, (1885) 54 L. J. Ch. 694.

(*c*) In the Goods of Moore, (1888) 13 P. D. 36.

(*d*) Williams (10th ed.) 400.

(*e*) In the Estate of Cleaver, [1905] P. 319.

(*f*) See Tr. & Coo. P. P. (14th ed.) p. 130, where instances of such grants are given, and *ibid.*, p. 858, where the general form of administration oath is given.

administrator, subject to such limits as the Court thinks fit to impose, and the Court may give him the full powers of an ordinary administrator during the time that he is to act as administrator. So that where such an administrator is empowered to sell a lease the lease thereby becomes vested in him, otherwise he would be unable to give effect to the sale ; and should he enter into possession he is personally liable during the continuance of his possession for rent at the yearly value (*g*).

SECT. 7.—*Administration limited until original or authentic copy of Will be brought into the registry.*

Administration may be granted limited until the Will of the deceased, or an authentic copy thereof, should be transmitted to this country (*h*) ; or where the Will is alleged to have been accidentally destroyed or lost, and there is no evidence of its contents until the original Will or an authentic copy be brought into the registry (*i*) ; but such grants are generally *ad colligenda* to protect the estate, or limited to dealing with and completing the sale of specific property (*k*).

Under special circumstances the Court will grant probate of certain papers forming part of the Will of a deceased, the other papers or authentic copies thereof not being in this country at the time, reserving power to the executor to prove the other papers, or authentic copies thereof, when they arrive, and on an undertaking on his part that he will do so (*l*).

SECT. 8.—*Administration limited during incapacity through illness or lunacy.*

Executor incapacitated.

Where an executor is incapacitated through illness, the Court will grant administration with the Will annexed for the use and benefit of the executor till his recovery (*m*).

(*g*) Whitehead *v.* Palmer, [1908] 1 K. B. 151.

(*h*) In the Goods of Metcalfe, (1822) 1 Add. 343.

(*i*) In the Goods of Wright, [1893] P. 21.

(*k*) *Ibid.* ; but see In the Goods of Campbell, (1829) 2 Hagg. 555, where the grant was not so restricted.

(*l*) In the Goods of Robarts, (1873) L. R. 3 P. & D. 110.

(*m*) In the Goods of Ponsonby,

Executor becoming lunatic.

Where a sole executor becomes lunatic it is the ordinary practice of the Court to make a limited grant to his committee for his use and benefit during his lunacy (*n*), but with the consent of the committee a grant with the Will annexed may be made to a residuary legatee (*o*); but if there is no committee the only way of clearing off a lunatic executor is by citation (*p*).

Administrator becoming lunatic.

The practice as to administration where a grant has been made to a single administrator as next-of-kin, and such next-of-kin becomes insane, is stated as follows by Sir F. H. Jeune in *In the Goods of Cooke* (*q*).

1. Where committee has been appointed.

"First, where such a lunatic has been so found by inquisition, and there is a committee of the property, the grant is made to such committee for the use of the lunatic, so long as he shall remain a lunatic. The first grant is not, in such case, impounded.

2. Where no committee, but person appointed under s. 116 of Lunacy Act, 1890, with general authority.

"Secondly, where the lunatic is not so found by inquisition, but, under s. 116 of the Act of 1890, a person has been appointed with general authority over the lunatic's property, such person has been, and it seems to me reasonably so, treated in the same way as if he were a committee of the lunatic's estate.

3. Where such person has only specified powers.

"Thirdly, if a person appointed under s. 116 has conferred upon him only specified powers falling short of general powers, such person is not to be considered to be in the same position as a committee of the lunatic, and is not entitled to a grant.

4. Where there is no committee and no person in position of committee.

"Fourthly, where there is no committee, and no person in the position of a committee, the practice has been to make a grant to another of the next-of-kin of the deceased for the use of the lunatic next-of-kin, so long as he shall remain a lunatic, and the precaution in that case is taken of having the first grant impounded.

[1895] P. 287; and see *post*, p. 159, as to incapacity after probate.

(*n*) In the Goods of Phillips, (1824) 2 Add. 336, n. (*b*).

(*o*) In the Goods of Milnes, (1826) 3 Add. 55.

(*p*) Tr. & Coo. P. P. (14th ed.) p. 203; and see *post*, p. 159.

(*q*) [1895] P. 68.

"Fifthly, it is not the practice to inquire whether the lunatic is likely to recover, and in the event of its appearing that he is not likely to recover, to revoke the old grant, and to make an absolute grant to the other next-of-kin."

No new grant though lunatic not likely to recover.

In the case of a defect in legal representation occasioned by the lunacy of one of several administrators the joint administration should be brought into the registry and revoked and a special administration granted to the sane administrator (*r*).

One of joint administrators becoming lunatic.

SECT. 9.—*Administration limited to specific effects.*

There may also be a grant of administration limited to certain specific effects of the deceased and the general administration may be committed to a different person. But grants of this nature are entirely exceptional, and should not be made unless a very strong reason is given (*s*).

Exceptional.

In *In the Goods of Hughes* (*t*) a grant was made under s. 73 of 20 & 21 Vict. c. 77 (*u*) to next-of-kin limited to a sum of money transmitted to this country for distribution by the Administrator-General in India.

To next-of-kin limited to fund transmitted from India for distribution.

The Court will grant letters of administration to the *cestui que trust* of a trust fund, limited to that fund, after the death of the trustee, on the consent of his personal representatives (*x*).

To *cestui que trust* limited to trust fund, after death of trustee.

An administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another (*y*). And where the deceased leaves a Will expressly limited to property abroad, which is proved by the executors in the foreign Court, but dies

To effects in a particular country or place.

(*r*) In the Goods of Newton, (1843) 3 Curt. 428; and see *post*, p. 159.

(*s*) In the Goods of Somerset, (1867) L. R. 1 P. & D. 350.

(*t*) (1873) L. R. 3 P. & D. 140.

(*u*) See *ante*, p. 144.

(*x*) Pegg *v.* Chamberlain, (1860) 1 Sw. & Tr. 527; In the Goods of Ratcliffe, [1899] P. 110; In the Goods of Butler, [1898] P. 9.

(*y*) Williams (10th ed.) 419.

intestate as to property in this country, administration of the property in this country will be granted to the next-of-kin (*z*).

Sect. 10.—*Administration limited to specific acts.*

Revival of representation necessary for performance of a single act.

It frequently happens that the representation is broken by the death of a sole executor intestate, and its revival is necessary merely for the performance of a single act. In such cases, administration with the Will annexed will be granted limited to that particular object. For instance, when the representatives of a trustee, in whom a term of years or charge was vested, are dead, a limited administration to another trustee for the purpose of making an assignment will be granted (*a*).

Or to commence or substantiate proceedings in Chancery.

Administration may be granted limited to commencing or substantiating proceedings in Chancery, but such an appointment is in many cases rendered unnecessary by R. S. C., Ord. XVI. r. 46, which enables the Court to proceed in the absence of any person representing the estate of the deceased or to appoint some person to represent his estate for all the purposes of the proceeding. Although, generally, this rule will not be applied where the estate of the deceased is that which is being administered, or against which relief is sought in the action, yet the Court has a discretion ; and where, owing to the great lapse of time since a fund was paid into Court by executors, every endeavour to trace the representatives of the testator had failed, the Court directed inquiries as to the persons legally and beneficially entitled to the fund without the suit being revived (*b*). The Court will not grant a general administration where an administration *ad litem* is sufficient, as where the purpose is limited (*c*). But a limited administration is not suffi-

(*z*) In the Goods of Mann, [1891] P. 293.

(*a*) Williams (10th ed.) 413 ; In the Goods of Butler, [1898] P. 9.

(*b*) Ballard *v.* Milner, (1895) W. N. 14.

(*c*) Williams (10th ed.) 416.

cient in a case which, from its nature and character, according to the practice of the Court, involves general inquiries as to next-of-kin, or general inquiries as to assets and creditors (*d*).

(*d*) Dowdeswell *v.* Dowdeswell, (1878) 9 C. D. 294

CHAPTER VIII.

OF THE SECURITY REQUIRED OF AN ADMINISTRATOR.

21 Hen. VIII. c. 5, s. 3.

Stat. 21 Hen. VIII. c. 5, s. 3, directed the Ordinary to grant administration "taking surety of him or them to whom shall be made such commission for the true administration of the goods, chattels, and debts which he or they shall be so authorised to minister."

22 & 23 Car. II. c. 10, s. 1.

Stat. 22 & 23 Car. II. c. 10, s. 1, provides that all Ordinaries and judges having power to commit administration shall upon committing administration take sufficient bonds with two or more able sureties, respect being had to the value of the estate, and the form of bond is given in the Act.

20 & 21 Vict. c. 77.

These provisions as to the surety bond or other security to be taken were repealed by s. 80 of the Court of Probate Act, 1857; and s. 81 of the same Act provides that "every person to whom any grant of administration shall be committed shall give bond to the judge of the Court of Probate to enure for the benefit of the judge for the time being, and, if the Court of Probate or (in the case of a grant from a district registrar) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; provided, that it shall not be necessary for the solicitor for the affairs of the Treasury or the solicitor of the Duchy of Lancaster applying for or obtaining administration to the use and benefit of her Majesty to give any such bond as aforesaid."

Bond now given to the judge;

with one or more sureties if required.

Treasury solicitor or solicitor of Duchy of Lancaster excepted.

Penalty of bond.

By s. 82, "Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the Court or district registrar, as the

case may be, shall in any case think fit to direct the same to be reduced, in which case it shall be lawful for the Court or district registrar so to do ; and the Court or district registrar may also direct that more bonds than one shall be given, so as to limit the liability of any surety to such amount as the Court or district registrar shall think reasonable " (*a*).

After part administration.

Where an estate has been partly administered and a further bond becomes necessary, the Court will allow the administrator to take the grant for the amount then due to the estate, on giving a bond with two sureties for double that amount (*b*).

Mode of enforcing bond.

By s. 83, " The Court may, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the Court to assign the same to some person, to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond."

The power of the Court under this section has been delegated to the registrars, and it is now the settled practice for the registrar on summons to make orders for assignment of bonds (*c*). The assignees, though trustees of the money recovered, need not sue in a representative capacity (*d*).

Condition of bond.

The bond is conditioned upon the doing of four things : first, to make a true and perfect inventory of the personal estate and effects of the deceased ; second, to administer the estate ; third, to make an account of the administration if

(*a*) For cases on these sections see Williams (10th ed.) 422 *et seq.*, and Tr. & Coo. P. P. (14th ed.) pp. 87 *et seq.*

(*b*) In the Goods of Halliwell, (1885) 10 P. D. 198 ; In the Goods of Oakey, [1896] P. 7.

(*c*) Cope *v.* Bennett, [1911] 2 Ch. 488.

(*d*) *Ibid.*

required; and fourth, to pay the residue to the persons entitled to it (*e*).

What amounts to breach.

When the administrator applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate, that is such a breach of the condition of the bond by which the administrator undertakes "well and truly to administer according to law," as will entitle the next-of-kin to have the bond put in suit at their instance (*f*).

So also it is a breach of the condition of the bond to pay out of the estate to another person, by whom it is lost, a sum of money to meet a legacy given to a minor, there being no other residue undistributed to meet the legacy (*g*).

But where an undischarged bankrupt died leaving property acquired after the bankruptcy and his administrator without notice of the bankruptcy distributed the property among the bankrupt's next-of-kin before the trustee in bankruptcy intervened, it was held that the administrator was protected by the administration bond, but that the next-of-kin must refund (*h*).

Court may dispense with sureties but not with bond.

Under s. 81, the Court has power to dispense with sureties altogether, but the Court has no power to dispense with the bond (*i*).

Applications to dispense with sureties are discouraged (*k*) unless the person applying for administration is a public official or a nominee of a government department; for instance, the official receiver in bankruptcy (*l*), or the nominee of the Board of Education (*m*).

Sureties will not be dispensed with by reason of the property being large and the risk small, but the security may be made up of any number of bonds (*n*); and the Court will

(*e*) Dobbs *v.* Brain, [1892] 2 Q. B. 207, 213.

(*f*) Arch. of Canterbury *v.* Robertson, (1833) 1 Cr. & M. 690.

(*g*) Dobbs *v.* Brain, *ubi sup.*

(*h*) *Re* Bennett, [1907] 1 K. B. 149.

(*i*) In the Goods of Powis, (1864) 34 L. J. P. M. & A. 55.

(*k*) In the Goods of McGowan, (1885) 10 P. D. 197.

(*l*) In the Estate of Causton, [1906] P. 124.

(*m*) In the Estate of Bryan, [1905] P. 88.

(*n*) In the Goods of Earle, (1885) 10 P. D. 196.

limit the bond in some cases (*o*). Nor will sureties be dispensed with although the estate is being administered by the Chancery Division and a receiver has been appointed (*p*).

Where all the debts had been paid, and the persons applying for administration were entitled, as the duly constituted legal personal representatives in two other estates, to receive the whole residue, the Court dispensed with sureties and directed that the bond of the applicants alone should be accepted (*q*).

Guarantee society as surety.

The Court will accept a guarantee society as surety to a bond even though the directors do not by the bond render themselves personally liable (*r*).

Justifying sureties.

Justifying sureties to the administration bond are called for at the Court's discretion according to the circumstances of each case (*s*); but the registry Rules provide that "when any person takes letters of administration in default of the appearance of persons cited, but not personally served with the citation, and when any person takes letters of administration for the use and benefit of a lunatic or person of unsound mind, unless he be a committee appointed by the Court of Chancery, a declaration of the personal estate and effects of the deceased must be filed in the registry, and the sureties to the administration bond must justify" (*t*).

Sureties cannot be substituted.

The Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them, since substituted sureties would not be and could not be made responsible for any past transaction of which they might know nothing (*u*).

(*o*) In the Goods of Paxton, (1889) 14 P. D. 40; In the Goods of Cormack, [1891] P. 151; Askew *v.* Askew, [1891] P. 174.

(*p*) Jackson *v.* Jackson, (1865) L. R. 1 P. & D. 12.

(*q*) In the Goods of Paton, [1901] P. 188; and see In the Estate of Harper, [1909] P. 88.

(*r*) Carpenter *v.* Queen's Proctor, (1882) 7 P. D. 235.

(*s*) Williams (10th ed.) 427. For instances where the Court has directed justifying security to be given, see Tr. & Coo. P. P. (14th ed.) p. 85.

(*t*) P. R., 1862, r. 42; D. R., r. 49 For the form of affidavit to be filed in such cases, see Tr. & Coo. P. P. (14th ed.) p. 772.

(*u*) In the Goods of Stark, (1886) L. R. 1 P. & D. 76.

Attestation of bond.

P.R., 1862, r. 38, provides that "Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or other person now or hereafter to be authorised to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, but in no case are they to be attested by the proctor, solicitor, attorney or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix."

Preparation of bond.

By r. 40, "The administration bond is, in all cases of limited or special administrations, to be prepared in the registry."

Foreign sureties when allowed.

By the Probate Directions of May 10, 1893 (*x*): "1. The administrator of a foreign subject resident abroad may (a) if it shall be proved by affidavit that the deceased left no debts in England, (b) by leave of a judge at Chambers, be allowed to give a bond with foreign sureties" (*y*).

"2. In all other cases sureties residing in the United Kingdom, the Channel Islands, or the Isle of Man, shall be required, except by leave of a judge at Chambers" (*z*).

Sureties responsible until grant annulled.

Although the grant of administration be void *ab initio*, as having been obtained by fraud, yet the sureties under the bond are responsible for the acts and defaults of the administrator until the grant is annulled; since mistake or fraud by the administrator in inducing his sureties to execute the bond does not affect the transaction as between the sureties and the Court or the persons entitled to the protection of the bond (*a*).

(*x*) See In the Goods of Scott, [1895] P. 342, n.

(*y*) As instances where such leave was given, see In the Goods of Fernandez, (1879) 4 P. D. 229; In the Goods of De Beaufort, [1893] P. 231.

(*z*) See In the Goods of Scott, *ubi sup.*, where leave was granted, deceased having left debts in England, but widow was unable to procure sureties in England.

(*a*) Debendra Nath Dutt *v.* Adm.-Gen. of Bengal, [1908] L. R. 35 Ind. App. 109.

CHAPTER IX.

OF REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

Jurisdiction.

THE Probate Division has jurisdiction to revoke its own grant of probate or letters of administration which has been improperly obtained either fraudulently or by false suggestion, or *per incuriam*, or which owing to circumstances has become ineffectual for the administration of the estate of the deceased; and applications for revocation will not be entertained by any other Division of the High Court (*a*).

Procedure by consent.

Where probate or letters of administration have been improperly granted, the registrar may by consent, on the voluntary application of the parties supported by affidavit, make an order revoking the grant (*b*).

Without consent: Non-contentious business

Unless the parties interested consent to a registrar's order for revocation, in non-contentious business the application for revocation must be made to the Court on motion (*c*).

Contentious business.

An action for revocation of probate is instituted when it is desired to obtain an order on the alleged invalidity of the Will, or on some material informality in obtaining the probate. So also an action for revocation of letters of administration should be instituted where the object of the suit is to compel the party who has obtained the grant to establish his relationship entitling him to the grant. In either case the plaintiff must call in the probate or letters of administration by a citation which must either precede or must issue simultaneously with the writ (*d*).

After probate in common form:

Probate granted in common form will be revoked if after

(*a*) *Re* Ivory, (1878) 10 C. D. 372; and see *ante*, p. 101. As to the statutory jurisdiction of the Probate Division, see *ante*, pp. 75, 125.

(*b*) See Tr. & Coo. P. P. (14th ed.) p. 185.

(*c*) *Ibid.*, p. 283.

(*d*) *Ibid.*, 317; and see *ante*, p. 124.

how next-of-kin should proceed :

citation by the next-of-kin to prove *per testes* the executor is unable to prove the Will (*e*).

how executor who has proved should proceed.

A bare executor who has proved a Will in common form cannot afterwards as such executor take proceedings for the purpose of having that probate revoked. If the validity of the Will is subsequently called in question he has no right to cite the persons interested under it, to propound it in solemn form, or to show cause why the probate in common form should not be revoked, but he should propound the Will and cite the parties interested in an intestacy to oppose it and give notice to the legatees that it is to be opposed, and that he does not intend to take steps to support it unless they guarantee his costs (*f*). The executor of an executor is in the same position in this respect as the original executor (*g*). But an executor, who is also next-of-kin of the testator, is not estopped by taking probate from afterwards instituting proceedings to disaffirm the Will (*h*).

Probate obtained by fraud.

Where probate in common form has been granted by consent, it cannot afterwards be revoked on proof that the conditions on which it was granted have not been complied with, unless fraud or circumvention practised either upon the Court or the parties is clearly proved in procuring it (*i*).

After probate in solemn form.

Although a Will has been proved in solemn form, if fraud be shown, or if a later distinct Will be set up, parties having an interest may take proceedings to obtain revocation of probate (*k*).

But in order to maintain an action to set aside, on the ground of fraud, a judgment establishing a Will and granting probate of it, the plaintiff must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the success of the action, otherwise the proceedings will be stayed on the motion of the defendant (*l*).

(*e*) See *ante*, p. 84, as to proof in solemn form.

(*f*) In the Goods of Benbow, (1862) 2 Sw. & Tr 488; In the Goods of Chamberlain, (1867) L. R. 1 P. & D. 316.

(*g*) *Ibid.*

(*h*) Williams *v.* Evans, [1911] P. 175.

(*i*) Nicol *v.* Askew, (1837) 2 Moore, P. C. C. 88.

(*k*) Williams (10th ed.) 451.

(*l*) Birch *v.* Birch, [1902] P. 130.

False suggestion by minor.

Probate granted to a minor on the tacit or false suggestion that he is of full age will be revoked (*m*).

One of several executors becoming of unsound mind.

Where one of several executors who has proved a Will subsequently becomes of unsound mind, the Court, on the application of the others, will revoke the grant and make a fresh grant of probate to the applicants, reserving power to the lunatic, in case he should become of sound mind and apply, to join in the probate (*n*).

One of several administrators becoming of unsound mind.

So also where one of several administrators becomes of unsound mind the grant is revoked and a new grant made to the sane administrators alone (*o*).

Sole executor or administrator becoming of unsound mind.

Where a sole executor or administrator becomes of unsound mind after taking the grant, a temporary administration will be granted during the incapacity of the personal representative without revoking the former grant (*p*).

Until administration recalled or revoked no person can act as executor.

By 20 & 21 Vict. c. 77, s. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked."

Administration not recalled except for just cause.

Since the stat. 21 Hen. VIII. c. 5, administration cannot be repealed unless for a just cause (*q*).

Instances of administration improperly granted.

The following are instances of sufficient ground for revocation of the grant: where it was granted within the 14 days (*r*) or without citing the necessary parties, or to other than the next-of-kin, or to illegitimate relatives, or to a woman who was not legally married to the deceased, or to the estate of a person still living as if dead, or to a wrong person having regard to the subsequent judicial construction of the Will, or to an elected guardian where it subsequently appears there is a testamentary guardian who had not renounced (*s*).

(*m*) Tr. & Coo. P. P. (14th ed.) p. 177.

(*n*) In the Estate of George Shaw, [1905] P. 92.

(*o*) In the Goods of Newton, (1843) 3 Curt. 428; see *ante*, p. 147.

(*p*) Tr. & Coo. P. P. (14th ed.) p. 279; and see *ante*, p. 146.

(*q*) Williams (10th ed.) 452.

(*r*) See *ante*, p. 125.

(*s*) See Williams (10th ed.) 453 *et seq.*

After administration properly granted.

If an administration has been properly granted even though the administrator has not intermeddled it cannot be revoked unless some strong ground be shown; a mere suggestion that it would be for the benefit of the estate is insufficient (*t*).

Distinction between administration limited to particular property and general grant.

The Court will however sometimes revoke an administration limited to particular property, and make a fresh grant to the assignee of the property, as where the administration was limited to a particular property of which the administrator was tenant for life, and he assigned his interest to his son, and asked that the grant might be revoked and a fresh grant made to his son limited to that particular property (*u*). But where there had been a general grant with the Will annexed to a woman who intermeddled with the estate and subsequently married, and being deserted by her husband, who could not be found, was unable to make a title to certain leasehold property, the Court of Appeal refused to revoke the grant, either as to the general estate or as to the particular part which she wished to sell, on the ground that it would be a dangerous practice to make such an order and without any precedent for it (*x*).

Administration granted to creditor may be revoked.

A creditor, except by the practice of the Court, has no right to administration (*y*), so that where the grant had been made to a creditor who, having been paid his debt, was desirous *bonâ fide* of retiring from the administration of the estate, the Court revoked the grant and made a new grant *de bonis non* to a child of the deceased (*z*).

Where administrator has absconded or cannot be found.

The Court will also revoke a grant which though lawfully made has subsequently become useless, and if allowed to subsist would prevent the administration of the estate (*a*). So that where the grant had been made to a creditor who,

(*t*) In the Goods of Heslop, (1846) 1 Robert. 457; Williams (10th ed.) 457.

(*u*) In the Goods of Ferrier, (1828) 1 Hagg. 241.

(*x*) In the Goods of Reid, (1886) 11 P. D. 70.

(*y*) Menzies *v.* Pulbrook, (1841) 2 Curt. 845, 850; and see *ante*, p. 119.

(*z*) In the Goods of Hoare, (1833) 2 Sw. & Tr. 361, n.

(*a*) Tr. & Coo. P. P. (14th ed.) p. 176.

after his debt had been fully satisfied, absconded and could not be found, the Court revoked the grant, without citing him, and made a new grant to the sole next-of-kin of the deceased (*b*). The same principle has been applied where a grant had been made to one of the residuary legatees who having partly administered left his home and could not be traced ; the Court revoked the grant and made a fresh grant to another of the residuary legatees (*c*).

Where however it can be shown that the administrator is residing out of the jurisdiction, administration limited to any property left unadministered may be granted under s. 18 of the Court of Probate Act, 1858 (*d*).

Where administrator is out of jurisdiction.

(*b*) In the Goods of Bradshaw, (1887) 13 P. D. 18.

(*c*) In the Goods of Covell, (1889) 15 P. D. 8.

(*d*) See *ante*, p. 139.

CHAPTER X.

OF THE EFFECT OF REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

THE effect of revocation of a grant of probate or letters of administration mainly depends upon whether the grant was void *ab initio* or merely voidable.

Where grant of administration was void *ab initio:* on concealment of Will appointing executors;

In *Abram* v. *Cunningham* (*a*) it was decided that where administration is granted on concealment of a Will which appointed executors, the grant is void from its commencement, and all acts performed by the administrator in that character are equally void and cannot be made good though the executor should afterwards appear and renounce. But in *Peckham's* case (*b*) it was held that if the administrator had paid funeral expenses, debts, or legacies which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, forasmuch as he himself would have been bound to pay it. And it would seem from a statement in *Graysbrook* v. *Fox* (*c*) that in an action by the true executor against the vendee of goods sold to him by the administrator, the sale is indefeasible if made to discharge the funeral expenses or debts which the administrator or executor was compellable to pay. Where, however, the act in question is one which the administrator was not compellable to do, but is a voluntary act on his part, it is simply void, and no title is thereby conferred on a vendee (*d*) or

(*a*) (1677) 2 Lev. 182.

(*b*) (1488) cited in Plowd. 282; Williams (10th ed.) 465.

(*c*) (1562) 1 Plowd. 275; see also Debendra Nath Dutt *v.* Adm.-Gen. of Bengal, [1908] L. R. 35 Ind. App. 109.

(*d*) Graysbrook *v.* Fox, *ubi sup.*; Hewson *v.* Shelley, [1913] W. N. 246.

mortgagee (*e*) from him, and the vendor is also liable in damages in an action by the true executor (*f*).

on concealment of Will not appointing executors.

Where the Will does not appoint executors the repealed grant obtained by suppressing the Will is not void *ab initio*, and therefore a sale of leaseholds under it was held to be a valid transaction (*g*).

Where grant of administration was voidable only.

And wherever the grant of administration is voidable only, as where it has been granted to a party not next-of-kin, or where the executor having acted, and the Court not knowing it committed administration to another, or without citing the necessary parties, all lawful acts done by the first administrator are valid as against the subsequent administrator, although if by covin they may be void by the stat. 13 Eliz. c. 5 against a creditor (*h*).

Pending appeal resulting in reversal of sentence.

Pending an appeal resulting in a reversal of a former sentence, all intermediate acts of the executor or administrator are ineffectual, because the appeal suspends the former sentence and on its reversal it is as if it had never existed (*i*). In such cases, therefore, it is expedient that an administrator *pendente lite* should be appointed under s. 70 of the Court of Probate Act, 1857 (*k*).

Administration granted on condition.

If the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good; so that the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional administrator (*l*).

Effect of 20 & 21 Vict. c. 77; as to *bonâ fide* payments made to or by executor or administrator before revocation;

By s. 77 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), it is enacted that "where any probate or administration is revoked under this Act, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same, and the executor

(*e*) Ellis *v.* Ellis, [1905] 1 Ch. 613.
(*f*) Woolley *v.* Clark, (1822) 5 B. & Ald. 744.
(*g*) Boxall *v.* Boxall, (1884) 27 C. D. 220; and cf. Craster *v.* Thomas, [1909] 2 Ch. 348.
(*h*) Williams (10th ed.) 463; Boxall *v.* Boxall, *ubi sup.*, at p. 224.
(*i*) *Ibid.*
(*k*) See *ante*, p. 141.
(*l*) Williams (10th ed.) 463.

or administrator, who shall have acted under any such revoked probate or administration, may retain, and reimburse himself in respect of, any payments made by him, which the person, to whom probate or administration shall be afterwards granted, might have lawfully made."

and indemnity to persons and corporations making *bonâ fide* payments or transfers.

And by s. 78 it is enacted that "all persons and corporations, making, or permitting to be made, any payment or transfer *bonâ fide*, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

CHAPTER XI.

OF FOREIGN DOMICIL AND FOREIGN ASSETS.

SECT. 1.—*Of the nature and acquisition of Domicil.*

Difference between nationality and domicil.

NATIONALITY and domicil are quite distinct matters. Natural allegiance fixes the political status of the individual, and *exuere patriam* or change of allegiance may be beyond his power. The law of domicil determines his civil status and may be changed as often as he pleases (*a*).

Difference between residence and domicil.

Residence and domicil are also two perfectly distinct things. Although residence may be some small *primâ facie* proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you do not find the party had any other residence in existence or in contemplation (*b*).

Domicil, what it is.

Domicil is an idea of law. It is the relation which the law creates between an individual and a particular locality or country (*c*).

No man can be without domicil.

Domicil of origin.

It is a settled principle that no man shall be without a domicil, and to secure this end the law attributes to every individual, as soon as he is born, the domicil of the father if the child be legitimate, or the domicil of the mother if the child be illegitimate. This is called the domicil of origin, and is involuntary (*d*).

Legitimation.

The status of the child—with respect to its capacity to be legitimated by the subsequent marriage of its parents—depends wholly on the status of the putative father, not on that of the mother. According to English law, where at the time of the bastard's birth the father has his domicil in

(*a*) Udny *v.* Udny, (1869) L. R. 1 Sc. App. 441, see per Ld. Westbury and Ld. Hatherley.

(*b*) Bell *v.* Kennedy, (1868) L. R 1. Sc. App. 320, 321, per Ld. Westbury.

(*c*) *Ibid.*

(*d*) Udny *v.* Udny, *ubi sup.*

England, no subsequent change of domicil can render practicable the bastard's legitimation (*e*). But it is the subsequent marriage which gives the legitimacy to a child who has at its birth in consequence of its father's domicil the capacity of being made legitimate by a subsequent marriage; consequently the domicil at the time of the marriage must be domicil in a country which attributes to marriage that effect (*f*).

Rights of child legitimate according to father's domicil though illegitimate by English law.

A child legitimated by the law of its father's domicil—as where at the birth and the subsequent marriage the parents were domiciled in Holland—although illegitimate according to English law is entitled to a share in the personal estate of an intestate dying domiciled in England, as one of the next-of-kin under the Statute of Distribution (*g*). But the rule as to the law of the domicil has never been extended to real property in England, and therefore a child born out of wedlock although legitimated by subsequent marriage of parents cannot inherit (*h*). The succession to chattels real depends also upon the *lex loci rei sitæ* (*i*).

But the rule that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit real property in England, relates only to the case of descent upon an intestacy, and does not affect the case of a devise of real estate to "children" (*k*).

Domicil of choice.

Domicil of choice is the creation of the party.

Burden of proof on person alleging change.

Where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home (*l*). The abandonment or change of a domicil is a proceeding of a very serious nature and an intention to

(*e*) Udny *v.* Udny, (1869) L. R. 1 Sc. App. 441.

(*f*) *Re* Grove, (1888) 40 C. D. 216.

(*g*) *Re* Goodman's Trusts, (1881) 27 C. D. 266.

(*h*) Doe *v.* Vardill, (1826) 5 B & C. 438.

(*i*) See *post*, pp. 173, 176.

(*k*) *Re* Grey's Trusts, [1892] 3 Ch. 88.

(*l*) Per Ld Halsbury, L.C., in Winans *v.* Att.-Gen., [1904] A. C. 288.

make such an abandonment must be proved by satisfactory evidence (*m*).

What constitutes change of domicil.

No person who is *sui juris* can change his domicil without a physical change of place coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence (*n*).

Intention may be inferred from conduct, and there are cases in which domicil has been changed notwithstanding a clear statement that no change of domicil was intended. An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from the circumstances of an intention to remain (*o*).

Domicil of minor.

A new domicil cannot be acquired by a party's own act during pupillage, or until the person is *sui juris* (*p*).

The domicil of a minor follows that of his father (*q*).

Domicil of lunatic after minority.

If a man at the time he attains his majority is of unsound mind, or remains in that state continuously up to the time of his death, the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicil for his son, and a change of domicil by the father will usually produce a similar change of domicil as regards the lunatic son (*r*).

Of minor during widowhood of mother.

After the death of the father, children remaining under the care of the mother follow the domicil which she may acquire until they are capable of gaining one by acts of their own (*s*). But although the mother, after the father's death, may change the domicil of her children, provided it be without fraudulent views to the succession of the estate, yet the domicil does not necessarily follow that of the surviving mother. For although changing her own, she may, from wise motives, refuse to alter that of her child. For instance, she

(*m*) Huntly (Marchioness) *v.* Gaskell, [1906] A. C. 56.

(*n*) Winans *v.* Att.-Gen., *ubi sup.*, per Ld. Lindley at p. 299.

(*o*) *Ibid.*

(*p*) Somerville *v.* Somerville, (1801) 5 Ves. 787; Forbes *v.* Forbes, (1854) Kay, 341.

(*q*) Sharpe *v.* Crispin, (1868) L. R. 1 P. & D. 611, 617.

(*r*) *Ibid.*

(*s*) Potinger *v.* Wightman, (1817) 3 Mer. 67; Johnstone *v.* Beattie, (1843) 10 Cl. & F. 42, at pp. 66, 138.

may acquire an English domicil while the child continues to reside in Scotland (*t*). Moreover, it would seem that it is only during the mother's widowhood that she can change the domicil of her infant, since by her marriage her own domicil is controlled by that of her husband (*u*).

It would seem also that a tutor cannot change the domicil of his pupil (*x*).

Domicil of wife.

By marriage, the domicil of the husband becomes that of the wife (*y*), and the wife's domicil follows the husband's during the coverture, since there is an overruling presumption of law, which cannot be rebutted by any fact, contract or otherwise, that they have one residence and one domicil (*z*) ; and the domicil so acquired is not changed by the death of the husband ; by that event her domicil prior to the marriage does not revert (*a*).

In the absence of a decree of judicial separation a married woman living apart from her husband has no power to change her domicil (*b*). There would seem to be no reason why she should not have power to change her domicil after sentence of judicial separation (*c*).

Matrimonial contract not affected by change of domicil.

Where upon marriage a marriage contract or settlement is made regulating the property of the spouses, such contract or settlement shall have effect given to its provisions wherever the spouses may afterwards be domiciled (*d*).

The same rule applies where, in the absence of a written contract, the law of the country where they were domiciled at the time of the marriage provides what is equivalent to a

(*t*) *Re* Beaumont, [1893] 3 Ch. 490.

(*u*) *Ibid.*

(*x*) See Potinger *v.* Wightman, (1817) 3 Mer. 67, referring to Pothier.

(*y*) Countess of Dalhousie *v.* M'Douall, (1840) 7 Cl. & F. 817.

(*z*) Warrender *v.* Warrender, (1835) 2 Cl. & F. 488, 528.

(*a*) Gout *v.* Zimmerman, (1847) 5 N. C. 440.

(*b*) Dolphin *v.* Robins, (1859) 7 H. L. C. 391, 417 ; *Re* Mackenzie, [1911] 1 Ch. 578.

(*c*) *Ibid.*, and see 20 & 21 Vict. c. 85, ss. 16, 21.

(*d*) De Nicols *v.* Curlier, [1900] A. C. 21. The rule that the law of the matrimonial domicil applies to a contract in consideration of marriage will yield to an express stipulation that some other law shall apply, or to other sufficient indications that the parties contracted with reference to some other law : *Re* Fitzgerald, [1904] 1 Ch. 573.

written contract, as, for instance, the system of community of goods in France, and in such case a change of domicil from France to England will not affect the community (*e*). Where, however, the law of the country where they were domiciled at the time of the marriage makes no settlement at all, but ignores the separate legal existence of the wife altogether, as was formerly the case in England ; or where the rights attach equally upon spouses who "in the married state" become there domiciled, at least so long as that domicil continues, as in the case of *communio bonorum* in Scotland, the rights of the wife shift with the change of her husband's domicil, and the wife is to look to the law of the country where the husband dies domiciled for the right she is to enjoy in case the husband thinks proper to die intestate (*f*).

Effect of consular office in foreign country.

The mere residence as a consular officer in a foreign country gives rise to no inference of a domicil in that country (*g*).

Military service of the Crown.

A British subject does not by entering into and remaining in the British army abroad abandon the domicil which he had at the time when he entered into the service (*h*).

Where duties necessarily require residence for indefinite period.

But where an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India (*i*).

Effect of Anglo-Indian domicil.

A domicil in India is, in legal effect, a domicil in the province of Canterbury ; and the law of England is therefore to be applied to the distribution of the property of intestates there domiciled. Moreover, it would seem the laws of England and India are now the same as regards the validity of Wills (*k*).

(*e*) De Nicols *v.* Curlier, [1900] A. C. 21.

(*f*) Lashley *v.* Hog, (1804) 4 Paton, 581 ; and see De Nicols *v.* Curlier, *ubi sup.*, at p. 27.

(*g*) Sharpe *v.* Crispin, (1868) L. R. 1 P. & D. 611.

(*h*) *Re* Macreight, (1885) 30 C. D. 165.

(*i*) Forbes *v.* Forbes, (1854) Kay, 341.

(*k*) Williams (10th ed.) 1268.

Residence in China; in Egypt;

British subjects resident in Chinese territory cannot acquire in China a domicil similar to that existing in India and commonly known as Anglo-Indian (*l*). Nor does permanent abode in Cairo under British protection by a person having a Turkish domicil of origin attach to him an Anglo-Egyptian domicil, since there is no such thing as domicil arising from society and not from connection with a locality, and Cairo is not a British possession governed by English law. Residence in a foreign State, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice (*m*).

in ex-territorial community.

Conventions negativing acquisition of domicil.

Stat. 24 & 25 Vict. c. 121 provides for conventions being made with foreign countries that no British subject dying resident in such foreign country, and no subject of any such foreign country dying resident in Great Britain or Ireland, shall acquire a domicil in such foreign country or Great Britain or Ireland, as the case may be, without having so resided for one year immediately preceding his or her decease and without having made and deposited as provided by the Act a declaration in writing of his or her intention to become domiciled in such foreign country. No convention, however, having as yet been entered into under this statute, its provisions are inoperative.

Sect. 2.—*Of the application of the law of Domicil in the Administration of Assets.*

Succession to moveable property.

The domicil of a deceased testator or intestate furnishes the governing rule for determining the succession to moveable property—that is, questions of testacy and intestacy, of the construction of the Will, and of the rights of those who claim to be next-of-kin (*n*).

(*l*) *Re* Tootal's Trusts, (1882) 23 C. D. 532.

(*m*) Abd-ul-Messih *v.* Farra, (1888) 13 App. Cas. 431.

(*n*) Enohin *v.* Wylie, (1862) 10 H. L. C. 1; Abd-ul-Messih *v.* Farra, (1888) 13 App. Cas. 431, 437; Canterbury Corporation *v.* Wyburn, [1895] A. C. 89.

Succession to immoveable property.

The rule as to the law of the domicil has never been extended to real property in England (*o*), and the succession to chattels real depends also upon the *lex loci rei sitæ* (*p*). Moreover English land mortgages being treated by English law as immoveables, bequests of English mortgages are governed by the mortmain law of England whatever be the domicil of the testator (*q*).

"*Mobilia sequuntur personam.*"

"*Mobilia sequuntur personam.*"—Personal property wherever situate follows the person, and therefore the rights of a person constituted in England the representative of a party who died domiciled in England are not limited to the personal property in England, but extend to personal property wherever locally situate (*r*).

The effects of the deceased are assets wherever situated, whether at home or abroad (*s*), and an English administrator who, without obtaining a foreign grant of administration, obtains possession abroad of assets of the deceased, will be liable to account for such assets in the administration in this country, or on an issue upon assets in answer to an action at law by a creditor of the deceased (*t*). But to enable a person to act as the personal representative in this country of a person who died domiciled abroad he must obtain a grant either of probate or letters of administration in England (*u*).

Jurisdiction to administer independent of the *lex domicilii*.

Although the domicil of a deceased testator or intestate furnishes the governing rule for determining the succession to moveable property (*x*), yet that being ascertained the *forum* in which such rights may be vindicated does not depend on the domicil. The jurisdiction of the Court of Chancery is *in personam*. It acts upon the person whom it finds within its jurisdiction and compels him to perform the duty which he

(*o*) Doe *v.* Vardill, (1826) 5 B. & C. 438.

(*p*) Freke *v.* Lord Carbery, (1873) L. R. 16 Eq. 461; Pepin *v.* Bruyère, [1902] 1 Ch. 24; *Re* Moses, [1908] 2 Ch. 235 (testacy); Duncan *v.* Lawson, (1889) 41 C. D. 394 (intestacy).

(*q*) *Re* Hoyles, [1911] 1 Ch. 179.

(*r*) Spratt *v.* Harris, (1833) 4 Hagg. 405.

(*s*) Att.-Gen. *v.* Dimond, (1831) 1 Cr. & J. 356, 370.

(*t*) Westlake, Priv. Int. Law (4th ed.) s. 103; and see Ewing *v.* Orr-Ewing, (1883) 9 App. Cas. 34.

(*u*) See *post*, p. 178.

(*x*) *Ante*, p. 172.

owes to the plaintiff. This jurisdiction will be exercised *ex debito justitiæ* unless it is shown that it would be an abuse of the process to make an order (*y*).

English law adopts the law of domicil at death.

English law adopts the law of the domicil as it stands at the time of the death, and does not adopt and give effect to retrospective changes that the legislative authority of the foreign country may make in that law (*z*).

Adjudication by Court of domicil, until reversed by same Court, conclusive.

Where the title has been adjudicated upon by the Courts of the domicil such adjudication is binding upon and must be followed by the Courts of this country, and if the decision of the foreign tribunal is wrong recourse must be had to the mode of appeal provided in the foreign country (*a*). But judgment by default against the English administrator obtained in a foreign Court is treated as *primâ facie* evidence only of the debt (*b*).

Lex fori rei sitæ observed in administration of assets among creditors.

Although *mobilia sequuntur personam* for purposes of succession, yet the *lex fori rei sitæ* must be observed not only in the collection of the assets but also in the administration of those assets, when collected, among creditors. For instance, if a man dies domiciled in England possessing assets in France, the French assets must be collected in France and distributed among creditors according to the law of France. If the French creditors are entitled according to that law to be paid in priority, that rule must be observed, because it is the *lex fori* and for no other reason. So if it should happen that a man died domiciled in France, leaving assets in England, those assets can only be collected under an English grant of administration, and being so collected, must be distributed according to the law of England. No doubt in a case in which French assets were distributed so as to give French creditors, as such, priority, in distributing the English assets the Court would be astute to equalise the payments, and take

All creditors treated equally subject to what priorities the *lex fori* may give them.

(*y*) Ewing *v.* Orr-Ewing, (1883) 9 App. Cas. 34; (1885) 10 App. Cas. 453, 502; *Re* Bonnefoi, [1912] P. 233; but see Deschamps *v.* Miller, [1908] 1 Ch. 856.

(*z*) Lynch *v.* Provisional Government of Paraguay, (1871) L. R. 2 P. & D. 268.

(*a*) *Re* Trufort, (1887) 36 C. D. 600; and see Pemberton *v.* Hughes, [1899] 1 Ch. 781.

(*b*) *Re* Boyse, (1880) 15 C. D. 591.

care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount. The English rule is that all creditors are to be treated equally, subject to what priorities the law may give them, from whatever part of the world they come, consequently in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors (*c*).

Duty of ancillary administrator.

Where the representatives in the two countries are different persons, the duty of the ancillary administrator in England is to pay the creditors coming in according to the *lex fori* and if there is a surplus to transmit it to the principal administrator (*d*).

Since the assets in one particular jurisdiction are liable to pay the debts there contracted, and the creditors may maintain against the local administrator an action for that purpose, it follows that the clear net residue only is that to which the administrator constituted by the Court of the domicil is entitled (*e*).

Although the Court of the country where ancillary administration is granted has jurisdiction to decree a final distribution of the assets, yet whether the Court ought to decree such a distribution or to remit the property to the *forum* of the domicil of the deceased is a matter of judicial discretion dependent upon the particular circumstances of each case (*f*).

Administration decree of English Court not limited to English assets.

It is not the practice of the English Court in making administration decrees with respect to assets of persons domiciled abroad to anticipate that there will be any proceeding in the Court of the domicil for administration and to limit the decree to the English assets, but will make the

(*c*) *Re* Kloebe, (1884) 28 C. D. 175.

(*d*) Cook *v.* Gregson, (1854) 2 Drew. 286, 288; Eames *v.* Hacon, (1881) 18 C. D. 347.

(*e*) Eames *v.* Hacon, (1880) 16 C. D. 407, at p. 410.

(*f*) See Story's Eq. Jur., s. 589, referred to by Ld. Selborne in Ewing *v.* Orr-Ewing, (1885) 10 App. Cas. 453, 514.

ordinary decree for the administration of the personal estate of the testator or intestate. If proceedings are subsequently instituted in the Court of the domicil the English Court will, of course, according to the comity of Courts, adopt those proceedings according to the necessities and exigencies of the case (*g*). And the Court has power to stay vexatious and unnecessary proceedings here, as where there is a pending suit in the Court of the domicil in which the estate can be administered and all questions that can arise in the course of the administration decided (*h*).

Although the English Court has no jurisdiction to restrain a foreign creditor, resident abroad, from proceeding in a foreign Court against the administrator (*i*), yet it has jurisdiction, acting *in personam*, to restrain vexatious proceedings in a foreign Court on the part of a litigant here, but it would seem that a defendant in an administration action would not before decree, except under special circumstances, be restrained on the ground of vexation from commencing against the plaintiff in England an action in a foreign Court, since up to decree the defendant has no control in the action (*k*).

Effect of a disposition invalid by the law of domicil.

If a British subject domiciled in a foreign country, by his Will validly appoints an executor, but makes a disposition of his personal property which, though valid by the laws of England, is invalid by the laws of that foreign country, the executor on obtaining probate here must distribute the property as if the deceased had died intestate (*l*).

Leasehold and freehold property governed by the *lex loci*.

Leasehold property is dealt with as immoveables, and is governed by the law of the country where the land which is the subject of the lease is situate in the same manner as lands held for a freehold tenure. Consequently the beneficial interest in leasehold property in England will not pass under a Will of a domiciled foreigner executed according to the law

(*g*) Stirling-Maxwell *v.* Cartwright, (1879) 11 C. D. 522.

(*h*) *Re* Orr-Ewing, (1882) 22 C. D. 456, 469, per Cotton, L.J.

(*i*) *Re* Boyse, (1880) 15 C. D. 591.

(*k*) Hyman *v.* Helm, (1883) 24 C. D. 531.

(*l*) Thornton *v.* Curling, (1824) 8 Sim. 310.

of his domicil but not attested as required by the Wills Act, 1837, notwithstanding that letters of administration with the Will annexed have been granted by the Probate Division (*m*). But a Will of a British subject duly executed as provided by Lord Kingsdown's Act (*n*), and admitted in England to probate, will pass the beneficial interest in leasehold property in England to the donee of that interest (*o*).

Although the *lex loci* applies to the disposition of land situate in a foreign country, yet where an English testator makes a valid disposition according to the *lex loci* of foreign land to trustees for sale, the proceeds when received by the trustees will be applied according to English law, although the settlement of the proceeds under the English Will would be invalid according to the foreign law (*p*).

Law of domicil not necessarily the general law, but may be a particular law applicable to foreigners.

When speaking of the law of domicil, as applied to the law of succession, it is meant not the general law, but the law which the country of domicil applies to the particular case under consideration. Such law may be totally different as applied to a natural-born subject of the country.

For instance, by the Belgian law the succession to an English-born subject dying domiciled in Belgium without having obtained royal authority to establish a domicil there is not governed by the law applicable to its natural-born subjects, but by the law of the deceased's own country (*q*). So also in Turkey, though no subject of that country can make a Will, yet by treaties between Great Britain and the Porte an Englishman domiciled there may make a Will and the succession to his personal estate is to follow the law of England (*r*).

Effect of law of domicil of choice being according to law of nationality.

Where a person acquires, according to English law, a domicil of choice in a country whose laws do not recognise domicil, but distribute the moveables of a foreigner, dying within its jurisdiction, according to the law of his nationality,

(*m*) Pepin *v.* Bruyère, [1902] 1 Ch. 24.
(*n*) 24 & 25 Vict. c. 114, *post*, p. 181.
(*o*) *Re* Grassi, [1905] 1 Ch. 584.
(*p*) *Re* Piercy, [1895] 1 Ch. 83.
(*q*) Collier *v.* Rivaz, (1841) 2 Curt. 855.
(*r*) Maltass *v.* Maltass, (1844) 1 Robert. 67.

and dies there, the English Courts will distribute his moveables according to the law of his domicil of origin (*s*).

Claim of Crown on death of bastard.

Although the law of the country in which the deceased was domiciled at the time of his death decides the course of distribution or succession as to moveable personalty, yet where an Austrian bastard who was entitled to a fund in Court in this country died in Vienna intestate and without heirs, the Austrian Government having claimed the fund, it was held that as the right claimed was not in the nature of a succession the maxim *mobilia sequuntur personam* did not apply, and that the Crown, by the law of England, was entitled to the fund as *bona vacantia* (*t*).

Sect. 3.—*Of Grant of Probate and Letters of Administration in connection with Foreign Domicil and Foreign Assets.*

Foreign representative must obtain representation in Probate Division to enable him to act here.

In order to enable a person to act as the personal representative in this country of a person who died domiciled abroad he must obtain a grant either of probate or letters of administration from the Probate Division here (*u*).

English Court will not administer in the absence of an English representative.

Not merely is no action maintainable here by a person in the character of executor or administrator until his title as such has been recognised by the Probate Division, but the English Court will not administer property of any person who died intestate abroad, at the suit of a creditor (*x*), or legatee (*y*), in the absence of a person authorised to represent his estate either by the Probate Division or the Rules of the Supreme Court.

Effect of sealing Irish probate or letters of administration and Scotch confirmation.

Sealing by the Probate Division in England of probate or letters of administration granted by the Court of Probate in Ireland (*z*) and of a Scotch confirmation (*a*) gives them the

(*s*) *Re* Johnson, Roberts *v.* Att.-Gen., [1903] 1 Ch. 821.

(*t*) *Re* Barnett's Trusts, [1902] 1 Ch. 847.

(*u*) Fernandes' Executors' Case, (1870) L. R. 5 Ch. 314; New York Breweries Co. *v.* Att.-Gen., [1899] A. C. 62.

(*x*) Lowe *v.* Fairlie, (1817) 2 Madd. 101.

(*y*) Logan *v.* Fairlie, (1825) 2 Sim. & St. 284.

(*z*) 20 & 21 Vict. c. 79, s. 95; 21 & 22 Vict. c. 95, s. 29.

(*a*) 21 & 22 Vict. c. 56, s. 12.

like force and effect as if probate or letters of administration had been granted in England. So also the Colonial Probates Act, 1892 (*b*), s. 2, provides for the recognition in the United Kingdom under Order in Council of probates and letters of administration granted in British possessions, which when sealed with the seal of the Court of Probate in the United Kingdom shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court, and s. 3 extends the application of the Act to probate or letters of administration granted by British Courts in foreign countries.

Effect of Colonial Probates Act, 1892.

The foundation of the jurisdiction of the Probate Division is that there is property (formerly personal property) of the deceased to be distributed within its jurisdiction (*c*). If there is no property here, then whether the person who was domiciled abroad died testate (*d*) or intestate (*e*) the Court has no jurisdiction to grant administration.

Foundation of jurisdiction of Probate Division is property within its jurisdiction.

Probate will be necessary if a testator purports to exercise a power of appointment affecting property in this country, although the testator left no property of his own here (*f*).

The Finance Act, 1894, does not affect the question what document ought to be admitted to probate (*g*). If a testator domiciled here makes a Will disposing of his property and dies leaving foreign moveable property, but without leaving any property in this country, should there be no occasion to obtain probate here the estate duty payable under s. 1 of the Finance Act, 1894, will be accepted on an account (Form C. 1) (*h*).

If a Will be made in a foreign country and proved there, disposing of personal property in this country, the executor must prove the Will here also (*i*).

Foreign Will disposing of property here must be proved here.

(*b*) 55 & 56 Vict. c. 6.

(*c*) In the Goods of Tucker, (1864) 3 Sw. & Tr. 585.

(*d*) In the Goods of Lock, (1876) 24 W. R. 281.

(*e*) Evans *v.* Burrell, (1859) 28 L. J. P. & M. 82; and see In the Goods of Sanders, [1900] P. 293.

(*f*) See *ante*, p. 94, and *post*, p. 182.

(*g*) In the Goods of Murray, [1896] P. 65, 72.

(*h*) See *post*, p. 198.

(*i*) Williams (10th ed.) 271.

Mode of proving foreign Will.

Where the Will is proved in the foreign country and the original Will is deposited there and cannot be removed the grant of probate here is of a copy of the original Will properly proved to be such limited until such time as may elapse before the original Will is brought in (*k*).

If two independent Wills are made, one disposing of the testator's property in this country and the other disposing of his property abroad, the former alone should be admitted to probate here. If, however, the two Wills are not independent the case is different. The English Will, if last, may incorporate the foreign Will and then the probate should include both documents, as they virtually become one document. So also the foreign Will, if last, may incorporate the English Will, in which case the foreign Will would not be limited in its operation to property abroad, and both would be included in the probate (*l*). When the foreign Will is not included in the probate, a copy must, in accordance with the practice, be filed in the registry, together with an affidavit verifying it, and a note must be appended to the probate that such affidavit has been filed (*m*).

As to codicils to Will proved abroad.

If a Will has been proved abroad it is the practice of the Probate Division to require that codicils should be proved in the Court from which the probate of the Will has been obtained before granting probate here (*n*).

Will in a foreign language.

If a Will is in a foreign language the probate is granted of a translation of the same by a notary public, or a person whose competency is vouched for by his official position. The executor is sworn to the foreign original or copy, but the translation alone is engrossed and registered (*o*).

Court guided by law of domicil in deciding as to validity of the instrument.

In granting probate the Court will be guided by the law of the country where the deceased was domiciled in determining as to the validity of the instrument as a Will. For instance, the Will of a married woman, a native of Spain, domiciled

(*k*) In the Goods of Lemme, [1892] P. 89; In the Goods of Von Linden, [1896] P. 148.

(*l*) In the Goods of Murray, [1896] P. 65, 71.

(*m*) *Ibid.*, at p. 73.

(*n*) In the Goods of Miller, (1883) 8 P. D. 167.

(*o*) Tr. & Coo. P. P. (14th ed.) p. 51.

there, was admitted to probate here upon affidavits that by the law of Spain she had power to bequeath as a *feme sole* the property which she brought her husband on her marriage (*p*). So codicils made by a British-born subject domiciled in the Portuguese dominions were refused probate as not being executed according to the law of Portugal (*q*).

Lord Kingsdown's Act (24 & 25 Vict. c. 114).

Will of British subject made out of the United Kingdom.

With regard to the manner of execution of Wills of British subjects of personal estate, Lord Kingsdown's Act (24 & 25 Vict. c. 114) provides, s. 1, that "every Will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall as regards personal estate (*r*) be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicil of origin."

Will of British subject made within the United Kingdom.

Sect. 2 provides that "every Will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

Effect of subsequent change of domicil.

Sect. 3 of the same Act, which section is not limited in its operation to the Wills of British subjects (*s*), provides that

(*p*) In the Goods of Maraver, (1828) 1 Hagg. 498.

(*q*) Stanley *v.* Barnes, (1830) 3 Hagg. 373.

(*r*) These words include leaseholds.

Re Grassi, [1905] 1 Ch. 584.

(*s*) In the Estate of Groos, [1904] P. 269. But query whether the change contemplated by the section is not from a foreign domicil to an

" no Will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same."

Saving of Wills valid if Act had not been passed.

By s. 4 " nothing in this Act contained shall invalidate any Will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such Will or other testamentary instrument may be revoked or altered by any subsequent Will or testamentary instrument made valid by this Act."

AS TO WILLS MADE IN EXECUTION OF POWERS OF APPOINTMENT.

Probate of Wills made in execution of powers.

A Will disposing of personal estate, situate in this country, made in pursuance of a power of appointment, and executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicil of the party making it (*t*). A testamentary appointment will not be read or established in the Chancery Division unless it has been proved as a Will (*u*). The grant of probate is conclusive that the instrument proved is the Will of the testator, but it is not conclusive as to its construction, or the rights to the property disposed of by the Will (*x*). The construction is governed by the law applicable to the instrument creating the power, whatever may be the domicil of the donee of the power (*y*). The execution of a special power of appointment validly created and given to a foreigner is in no way affected by any disability which he or she may

Testamentary appointment must be proved as a Will.

Construction governed by law applicable to instrument creating the power.

English domicil. In the Goods of Reid, (1866) L. R. 1 P. & D. 74, a Scotchman had at his death acquired an English domicil, and In the Estate of Groos, *ubi sup.*, a Dutch lady had subsequently acquired an English domicil.

(*t*) Tatnall *v.* Hankey, (1838) 2 Moo. P. C. 342; In the Goods of Alexander, (1860) 29 L. J. P. & M. 93; In the Goods of Hallyburton, (1866) L. R. 1 P. & D 90; In the Goods of Huber, [1896] P. 209; In the Goods of Tréfond, [1899] P. 247; Murphy *v.* Deichler, [1909] A. C. 446.

(*u*) *Ante*, p. 94.

(*x*) D'Huart *v.* Harkness, (1865) 34 B. 324; Pouey *v.* Hordern, [1900] 1 Ch. 492; *Re* Megret, [1901] 1 Ch. 547.

(*y*) *Re* Bald, (1897) 76 L. T. 462; Pouey *v.* Hordern, *ubi sup.*; *Re* Megret, *ubi sup.*

be under to dispose of his or her own property by the laws of his or her domicil (*z*). But where by the execution of a general power the appointed property is made assets for all purposes, the testator's power of disposition over those assets was no greater than over property to which he was absolutely entitled (*a*).

When foreign Will must comply with formalities of power or Wills Act.

A power to appoint by Will duly executed, and not requiring any special formalities of execution, is well exercised by a Will good according to the law of the country of the testator's domicil, though it does not follow the forms of the Wills Act, 1837 (*b*). Where, however, special formalities are required by the instrument creating the power, it is not enough that the instrument purporting to execute the power should be a Will valid according to the law of domicil, but in cases where the provisions of the Wills Act do not apply the Will must comply with the terms of the power (*c*). Equity will, however, in certain cases, aid the defective execution of a power (*d*).

A Will which is only valid by virtue of Lord Kingsdown's Act (*e*) is not a valid execution of a power, whether special or general, unless it is executed in the presence of and attested by two witnesses as required by ss. 9 and 10 of the Wills Act (*f*).

When general bequest operates as a valid execution of a general power.

In *Re Price* (*g*), there being indications upon the face of the Will that the testatrix, a domiciled French subject, wrote it with reference to the law of England as well as the law of France, Stirling, J., held that he was entitled to apply the same rules of construction which would by English law be applied to a Will in the same terms and of the same date, including the rule of construction introduced by s. 27 of the Wills Act, and that the general bequest operated as a valid

(*z*) Pouey *v.* Hordern, [1900] 1 Ch. 492; Murphy *v.* Deichler, [1909] A. C. 446, 448.

(*a*) *Re* Pryce, [1911] 2 Ch. 286.

(*b*) D'Huart *v.* Harkness, (1865) 34 B. 324; *Re* Price, [1900] 1 Ch. 442.

(*c*) Barretto *v.* Young, [1900] 2 Ch. 339.

(*d*) *Re* Walker, [1908] 1 Ch. 560; and see Farwell on Powers, 2nd ed., p. 335.

(*e*) *Ante*, p. 181.

(*f*) *Re* Kirwan's Trusts, (1883) 25 C. D. 373; Hummel *v.* Hummel, [1898] 1 Ch. 642.

(*g*) *Ubi sup.*

execution of the general power. It would have been otherwise had the construction been according to the law of the place applicable to the document executed by the donee, since s. 27 is a rule for English construction (*h*).

Will of married woman not in form required by law of domicil.

Where a married woman dies domiciled abroad, having made a Will in exercise of a power under an English settlement, which is a valid execution of the power but is not in the form required by the law of her domicil, the Court does not grant probate to the executor named in the Will, but will make a grant of administration with the Will annexed, and in the absence of a consent by the husband the grant will be to the appointee limited to such property as the deceased had power to dispose of and did dispose of by the Will, but, with such consent, the Court will make a general grant with the Will annexed (*i*).

PRINCIPLE ON WHICH GRANTS OF ADMINISTRATION ARE MADE.

Grant made to person entitled by law of domicil.

The principle on which grants should be made by the Probate Division in respect of persons domiciled in foreign countries is that regard should be had to the law of the domicil in order to determine what power or authority has been vested in anyone with regard to dealing with the estate, and then to give such a grant to such person as will enable him to perform in this country the duties imposed on him (*k*).

When an application is made to the Probate Division either for an original or a *de bonis non* administration by a person who satisfies the Court that by the proper authority of the country of the domicil of the deceased he has been authorised to administer the estate of the deceased, the Court will, without further consideration, grant power to that person to administer the English assets (*l*).

Where a testator died domiciled in Belgium leaving a Will

(*h*) *Re* D'Este's Settlement Trusts, [1903] 1 Ch. 898; *Re* Scholefield, [1905] 2 Ch. 408; and see *Re* Baker's Settlement Trusts, (1908) W. N. 161.

(*i*) In the Goods of Tréfond, [1899] P. 247; In the Goods of Vannini, [1901] P. 330.

(*k*) In the Goods of Briesemann, [1894] P. 260.

(*l*) In the Goods of Hill, (1870) L. R. 2 P. & D. 89.

and codicil in English form appointing executors, and also leaving a Belgian Will, the Court made a grant of administration with all three documents annexed in favour of two persons who had been appointed administrators of the deceased's estate abroad in accordance with the law of the domicil, notwithstanding the opposition of the persons named executors in the English Will (*m*).

Limited grant where powers given by Will fall short of powers of an English executor.

Where in a foreign Will a person is in terms named executor, probate will be granted in this country to that person, but where the powers granted to a person in the Will fall short of the powers of executors according to English law, there will be a grant to him of administration with powers as near as may be to those granted by the Will (*n*).

But where the Court of the domicil has made a grant of administration limited in time the English Court will under s. 73 of the Court of Probate Act, 1857, make a general grant to the foreign administrator (*o*).

Probate may be granted as executor according to the tenor.

Where the applicant has not been in terms appointed executor, but the Court is able to infer that it was the intention of the testator that he should have the power of an executor, that is, he is executor according to the tenor, probate will be granted to him as executor according to the tenor (*p*).

When Court will not follow grant of foreign domicil.

The Court will not follow the grant of the foreign domicil if the administrator appointed by the foreign Court is by the law and practice of this country personally disqualified from taking a grant here, as for instance a minor (*q*).

The rule to follow the foreign grant does not apply where the foreign grant is made not to the person entitled to it, but to some other person with the consent of the person entitled (*r*).

Except where a convention between this country and any

(*m*) In the Goods of Meatyard, [1903] P. 125.

(*n*) In the Goods of Von Linden, [1896] P. 148, per Jeune, P.

(*o*) In the Estate of Levy, [1908] P. 108.

(*p*) *Ibid.*

(*q*) In the Goods of Meatyard, [1903] P. 125, per Jeune, P.

(*r*) In the Goods of Weaver, (1867) 36 L. J. P. & M. 41.

foreign State has been made in pursuance of s. 4 of 24 & 25 Vict. c. 121 (*s*) the law of this country does not recognise any right of a foreign consul to take possession of the property of a foreigner dying here *in itinere*, notwithstanding he has such a right by the law of the country of the domicil of the deceased, and the Court here will not make a grant of administration to him on that ground alone (*t*).

Agent applying for grant must exhibit proper authority from person entitled.

Where a party applies for administration as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported without exhibiting to the Court a power of attorney from the person so entitled (*u*).

Evidence of domicil not required if no question raised.

In the case of a foreigner dying intestate within the British dominions, it would seem that, if no question is raised, the Court will grant administration to the person entitled to the effects of the deceased according to the law of his own country without evidence as to his domicil (*x*).

Decree of Court of domicil conclusive as to title to administer.

The Court here considers itself bound by the decree of the Court of domicil ; so that in the case of a domiciled Frenchman, the French Court having decreed that the time limited by French law for the execution of the executorship by the person nominated executor had ceased, and that he had no longer any right to intermeddle, the Court here refused to grant probate to him (*y*).

(*s*) See *ante*, p. 172. It would seem no convention has ever been made under this Act.

(*t*) Aspinwall *v.* the Queen's Proctor, (1839) 2 Curt. 241.

(*u*) In the Goods of the Elector of Hesse, (1827) 1 Hagg. 93.

(*x*) Williams (10th ed.) 338.

(*y*) Laneuville *v.* Anderson, (1860) 2 Sw. & Tr. 24.

CHAPTER XII.

OF DEATH DUTIES.

Death duties are now mainly regulated by the Finance Act, 1894 (57 & 58 Vict. c. 30), the Legacy Duty Act, 1796 (36 Geo. III. c. 52), the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), and the various amending Acts.

In this treatise it is not intended to deal with these Acts beyond pointing out generally the nature of the duties, the requirements of the Commissioners of Inland Revenue, and the liability of executors and administrators under the Acts for the death duties for which they may be accountable.

Sect. 1.—*Of Estate Duty and Settlement Estate Duty.*

Prior to the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), duties were imposed upon probates of Wills and letters of administration, but s. 27 of that Act substituted duties to be charged and paid on an affidavit to be required and received from the person applying for the probate or letters of administration ; and s. 30 provides that no probate or letters of administration shall be granted in England or Ireland unless the same bear a certificate in writing under the hand of the proper officer of the Court, showing that the affidavit for the Commissioners of Inland Revenue has been delivered, and that such affidavit if liable to stamp duty was duly stamped, and stating the amount of the gross value of the estate and effects as shown by the account.

Charged and paid on affidavit.

No grant of probate or letters of administration without certificate that affidavit has been delivered.

Instructions as to Estate Duty in respect of property passing on the deaths of persons dying after 1st August, 1894, are issued by the Commissioners (Form A—2). The Instructions are in paragraphs numbered 1 to 79 with references to the sections of the Finance Act, 1894, unless otherwise stated, and it will be sufficient for the present

purpose to give a summary of these instructions with some additional remarks.

Estate duty.

"I. Estate Duty, except as expressly provided, is leviable upon the principal value of all property, real or personal, settled or not settled, which passes on the death of a person who dies after the 1st August, 1894. [See ss. 1 and 24.]"

What property passes on death.

Paragraphs 2—8 indicate what the property so passing includes, *inter alia*, property of which the deceased was competent to dispose at his death, whether he actually disposed of it by his Will or not; donations *mortis causâ*; *inter vivos* gifts made by the deceased, dying after the 30th April, 1909, within three years of his death, exclusive of gifts made for public or charitable purposes more than twelve months before his death, or in consideration of marriage, or for normal and reasonable expenditure, or not exceeding £100 in value in the case of any donee [see Finance (1909–10) Act, 1910, s. 59]; joint ownership; policies of life assurance; annuities the benefit of which arose on the death of the deceased.

Sect. 2 (1) (b) excludes property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole. A trustee entitled to an annual sum by way of remuneration for his services is the holder of an office within this exception (*a*).

Paragraphs 7—20 indicate in what cases Estate Duty is not payable, including objects of national, scientific, or historic interest and settled so as to be enjoyed in succession in kind only.

Neither Estate Duty nor Settlement Estate Duty is payable upon the principal value of an advowson or upon the proceeds of sale thereof (*b*).

Aggregation.

Paragraphs 25 and 26 indicate what property is to be aggregated for determining the rate of Estate Duty to be

(*a*) Att.-Gen. *v.* Eyres, [1909] 1 K. B. 723.

(*b*) Att.-Gen. *v.* Peek, [1912] 2 K. B. 192; [1913] 2 K. B. 487.

paid, and in what cases property is not to be aggregated, or to be treated as an estate itself.

Settlement estate duty.

" 29. (1.) Where property, in respect of which Estate Duty is leviable, is settled by the Will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased [see *Att.-Gen.* v. *Milne*, [1913] 2 K. B. 606] to some person not *competent to dispose* [see s. 22 (2) (a)] of the property, a further Estate Duty called ' Settlement Estate Duty ' is leviable upon the principal value of the settled property, except where the only life interest in such property, after the deceased's death, is that of the husband or wife of the deceased [see s. 5 (1) (a)], or where the disposition took effect before the 2nd August, 1894 [see s. 21 (1) (4)], or, under the deceased's Will, where the net value of the property in respect of which Estate Duty is leviable on the death of the deceased, exclusive of property settled otherwise than by the deceased's Will, does not exceed £1,000. [See s. 16 (3).] "

" (2). Where on a death on or after the 1st July, 1898, Settlement Estate Duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property is to be repaid. [See Finance Act, 1898, s. 14.] "

Settled property defined.

" (3.) ' Settled Property ' is property comprised in a ' settlement ' [see s. 22 (1) (h)], and a ' settlement ' is any instrument which is a settlement within the meaning of ss. 2 and 58 of the Settled Land Act, 1882, *or* if it related to real property would be a settlement within the meaning of those sections, and includes a settlement effected by a parol trust. [See s. 22 (1) (i).] "

Settlement Estate Duty to be paid out of the settled property.

" 30. Settlement Estate Duty leviable in respect of personal property settled by the deceased's Will (unless the Will contains an express provision to the contrary) is, *where the deceased died on or after the 1st July*, 1896, to be payable out of the settled property in exoneration of the rest of the deceased's estate. [See Finance Act, 1896, s. 19 (1).] "

Crown entails.

" 31. Where lands or chattels are so settled by Act of Parliament or Royal grant that no one of the persons successively entitled can alienate the same, the Settlement Estate Duty is not payable. [See s. 5 (5).] "

Deduction of stamp duty paid on settlement.

" 32. The *ad valorem* stamp duty (if any) charged on a settlement may be deducted from the Settlement Estate Duty payable thereunder [see s. 5 (4)], but the settlement must be produced in support of the deduction."

Accountable persons: Executor.

" 33. The executor of the deceased is to pay the Estate Duty in respect of all personal property, wheresoever situate, of which the deceased was *competent to dispose* [see s. 22 (2) (a)] at his death, except [see Finance Act, 1896, s. 20 (2)] such objects of national, etc., interest as are within clause 20 above, on delivering the Inland Revenue affidavit, and may pay in like manner the Estate Duty on any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or in the case of property not under his control, if the persons accountable for the duty thereon request him to make such payment. [See ss. 6 (2) and 8 (3).] The executor is not liable for any Estate Duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received. [See s. 8 (3).] Settlement Estate Duty leviable in respect of any personal property, settled by the deceased's Will, is to be collected upon an account to be delivered by the executor within six months after the death. [See Finance Act, 1896, s. 19 (2).] "

Administrator.

Unless the context otherwise requires, the expression " executor " means the executor or administrator of a deceased person, and includes any person who takes possession of or intermeddles with the personal property of a deceased person. [See s. 22 (1) (d)] (*c*).

Persons taking possession or intermeddling.

Other persons accountable.

" 34. Where property passes on the death of the deceased and his executor is not accountable for the Estate Duty thereon, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent

(*c*) See New York Breweries Co. *v.* Att.-Gen., [1899] A. C. 62.

of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, is accountable for the Estate Duty on the property. [See s. 8 (4).] Such objects of national, etc., interest as are within clause 20 above are to be accounted for by the person who sells them or becomes competent to dispose of them. [See Finance Act, 1896, s. 20 (2).]"

A *bonâ fide* purchaser for value without notice is not liable to or accountable for duty. [See s. 8 (18).]

Mode of valuation.

Paragraphs 37—39 indicate how the principal value of any property is to be ascertained.

Administration expenses of property out of the United Kingdom.

"40. Where the Commissioners are satisfied that any additional expense in administering or in realising foreign property has been incurred by reason of the property being situate out of the United Kingdom, an allowance for such expense not exceeding 5 per cent. on the value of the property is made. [See s. 7 (3).]"

Foreign duty.

"41. Where the Commissioners are satisfied that by reason of the deceased's death any duty in respect of foreign property is payable in the country where the property is situate, an allowance of the amount of the duty is made from the value of the property. [See s. 7 (4).]"

Income and interest.

"42. Every estate is to include all income upon the property included therein down to and outstanding at the date of the deceased's death. [See s. 6 (5).]"

Funeral expenses and debts.

"43. Allowance against the gross principal value of an estate is made for reasonable funeral expenses and for debts and incumbrances (including mortgages or terminable charges [see s. 22 (1) (k)]) incurred or created by the deceased *bonâ fide* for full consideration in money or money's worth wholly for his own use and benefit, and which take effect out of his interest. [See s. 7 (1) (a).]"

No allowance is made for a debt upon the testator's covenant with the trustees of the settlement on his son's

marriage, to be paid within six months after the testator's death and to be held upon the trusts of the settlement, as the testator did not receive any consideration in money or money's worth and it was not incurred for his own use and benefit, nor are the trustees liable for any part of the estate duty under s. 9 (1) (*d*).

Increment Value Duty.

" 44. Allowance is made in determining the value of the estate for the purposes of Estate Duty for the amount of Increment Value Duty as if it were a debt. [See Finance (1909–10) Act, 1910, s. 62.] "

By the Act of 1910 Increment Value Duty is charged and payable on the increment value of any land (subject to certain exemptions (see s. 7)) where (*inter alia*) on death after the 29th April, 1910, the fee simple of the land or any interest in the land is comprised in the property passing on the death of the deceased within the meaning of ss. 1 and 2 (1) (a), (b) and (c) and sub-s. 3 of the Finance Act, 1894, as amended by any subsequent enactment. The rate of duty is one pound for every complete five pounds of that value accruing after the 30th April, 1909. By s. 2 the increment value is the amount (if any) by which the site value of the land on the occasion on which the duty is to be collected exceeds the original site value and such site value is the principal value as ascertained for the purposes of Part I. of the Act of 1894. By s. 5 the provisions of the Act of 1894 as to the assessment, collection and recovery of Estate Duty shall apply as if such Increment Value Duty were Estate Duty, and where the interest in land subject to the duty is property passing to the personal representative as such the duty shall be payable out of that interest in land in exoneration of the rest of the deceased's estate, and as to the rest of the deceased's property the Crown shall, as a creditor in respect of such Increment Value Duty, rank *pari passu* with the other creditors of the deceased.

Debts in respect whereof re-imbursement claimable.

" 46. No allowance can be made for any debt in respect whereof there is a right to re-imbursement from any other

(*d*) *Re* Gray, [1896] 1 Ch. 620; and see *post*, p. 510.

estate or person unless such re-imbursement cannot be obtained. [See s. 7 (1) (b).]"

Foreign debts.

"47. An allowance is not made in the first instance for debts due from the deceased to persons resident out of the United Kingdom, unless contracted to be paid in the United Kingdom or charged on property situate within the United Kingdom, except out of the value of any personal property of the deceased situate out of the United Kingdom on which Estate Duty is paid. No repayment of Estate Duty is made in respect of any such debts except to the extent to which the personal property of the deceased situate out of the United Kingdom is shown to be insufficient for their payment. [See s. 7 (2).]"

Interests in expectancy.

"48. Where an estate includes an interest in expectancy (and this expression covers an estate in remainder or reversion, and every other future interest, whether vested or contingent, but does not include reversions expectant upon the determination of leases [see s. 22 (1) (j)]) Estate Duty in respect of that interest is to be paid, at the option of the person accountable for the duty, either with the duty on the rest of the estate or when the interest falls into possession. [See s. 7 (6).] If the duty is not paid with the Estate Duty on the rest of the estate, then, for the purpose of determining the rate of Estate Duty in respect of the rest of the estate, the value of the interest is to be its value at the date of the death of the deceased. [See s. 7 (6) (a).] The rate of Estate Duty upon the interest when it falls into possession is to be calculated according to its value at that time, together with the value of the rest of the estate as previously ascertained. [See s. 7 (6) (b).]"

Estate Duty in respect of interests in expectancy may be commuted for a certain sum presently payable. [See s. 12.]

Provision is made by the Act of 1894, and by the amending Acts, for the payment of duty on the falling into possession of an interest which had been sold or mortgaged as an expectancy, and see the Act of 1910,

s. 57, for limit put on debts deductible where incurred for the purchase, acquisition or extinction of any interest in expectancy.,

When duty is due.

" 51. The duty, which is to be collected upon an Inland Revenue Affidavit or Account, is due on the delivery thereof, or at the expiration of six months from the death, whichever first happens [see s. 6 (7)], except in the case of such objects of national, etc., interest as are within clause 20 above, where the duty is due one month after the date of sale, or six months after their coming into possession of a person competent to dispose of them, as the case may be, or on delivery of the account, whichever first happens. [See Finance Act, 1896, s. 20 (2).] "

Payment of additional duty.

" 52. Estate Duty is, in the first instance, calculated at the appropriate rate according to the value of the estate, as set forth in the Inland Revenue affidavit or account delivered, but if afterwards it appears that for any reason too little duty has been paid, the additional duty is payable, and is treated as duty in arrear. [See s. 8 (7).] "

Interest on duty.

" 53. Simple interest at 3 per cent. per annum, without deduction for income tax, is payable upon all Estate Duty from the date of the deceased's death, or, where the duty is payable by instalments, or becomes due at any later date than six months after the death, from the date at which the first instalment or the duty becomes due, and is recoverable in the same manner as if it were part of the duty. [See Finance Act, 1896, s. 18 (1).] "

Interest on fixed duty.

" 54. When the fixed duty of 30*s.* or 50*s.* under s. 16 is paid within twelve months after the death of the deceased, interest is not charged. [See s. 16 (5).] "

Instalments on real property.

" 55. The Estate Duty due upon an account of real property may, at the option of the person delivering the account, be paid by eight equal yearly instalments or sixteen half-yearly instalments, with interest at the rate of 3 per cent. per annum from the date at which the first instalment is due, and the first instalment is to be due at the expiration of twelve months from the death, and the interest on the

unpaid portion of the duty is to be added to each instalment and paid accordingly, but the duty for the time being unpaid, with such interest to the date of payment, may be paid at any time, and, in case the property is sold, is to be paid on completion of the sale, and if not so paid, is to be duty in arrear. [See s. 6 (8).]"

Growing timber.

By s. 9 of the Act of 1912 (2 & 3 Geo. V. c. 8) growing timber shall not be taken into account in estimating the principal value of the estate, or the rate of estate duty, and estate duty shall not be payable thereon, but is payable on the net moneys from time to time received from sale of timber when felled until the land again becomes liable.

Power to transfer land in satisfaction of Duty

"56. The Commissioners may, if they think fit, on the application of any person liable to pay Estate Duty or Settlement Estate Duty in respect of any real (including leasehold) property, passing on a death occurring on or after the 30th April, 1909, accept in satisfaction of the whole or any part of such duties, such part of the property as may be agreed upon between the Commissioners and that person. [See Finance (1909–10) Act, 1910, s. 56 (1).]"

Instalments on annuities.

"57. The Estate Duty in respect of any annuity or other definite annual sum referred to in s. 2 (1) (d) of the Finance Act, 1894, may be paid by four equal yearly instalments, the first to be due twelve months after the death. Interest on the whole unpaid duty is to be added to the second and subsequent instalments. [See Finance Act, 1896, s. 16.]"

Colonial duty.

Paragraph 58 indicates when a deduction may be made where colonial duty has been paid. (See *post*, p. 201).

Penalties.

"63. Penalties are provided for the wilful failure to deliver accounts or to comply with the requirements which the Commissioners are empowered to make. [See s. 8 (6) and (14).]"

Rate of Estate Duty.

"64. (iv.) In the case of persons dying on or after the 30th April, 1909, the rates of Estate Duty are according to

the following scale. [See Finance (1909-10) Act, 1910, s. 54, and the Second Schedule to that Act.]"

Principal Value of the Estate.				Rate per cent.
	£		£	£
		Not above	100	0
Above	100	but not above	500	1
„	500	„	1,000	2
„	1,000	„	5,000	3
„	5,000	„	10,000	4
„	10,000	„	20,000	5
„	20,000	„	40,000	6
„	40,000	„	70,000	7
„	70,000	„	100,000	8
„	100,000	„	150,000	9
„	150,000	„	200,000	10
„	200,000	„	400,000	11
„	400,000	„	600,000	12
„	600,000	„	800,000	13
„	800,000	„	1,000,000	14
„	1,000,000	.. ..	.. ..	15

Rates of settlement estate duty.

"65 (i.) The rate of Settlement Estate Duty leviable in respect of 'settled property' is 1 per cent. where the deceased died after the 1st August, 1894, and before the 30th April, 1909. [See s. 17.]"

"(ii.) In the case of persons dying on or after the 30th April, 1909, the rate is 2 per cent. [See Finance (1909-10) Act, 1910, s. 54.]"

Paragraph 66 shows the adjustments to be made in determining the rate of duty in case of fractions of £100 capital, having regard to the date of death of the deceased and the value of the estate.

Estates not above £500 gross.

"67. Where the GROSS value of the property real and personal on which Estate Duty is payable on the death of the deceased exclusive of property settled otherwise than by the Will of the deceased exceeds £100, but does not exceed £300, a fixed duty of 30*s.* *may be* paid, and where it exceeds £300 but does not exceed £500, a fixed duty of 50*s.* *may be* paid. [See s. 16 (1).] Provided that where any property passing on a death occurring on or after the 30th April, 1909, is proved to the satisfaction of the Commissioners to be subject to a charge created for the purpose of securing unpaid pur-

chase money, or money borrowed to pay purchase money, or to be subject to or liable to be made subject to a charge for securing an advance obtained for the purchase thereof, the GROSS value of such property for the purpose of this sub-section is the principal value after deducting any such charge or liability to which the property is so subject. [See Finance (1909-10) Act, 1910, s. 61 (2).] Where the fixed duty of 30*s.* or 50*s.* has been paid, and it is afterwards discovered that the gross value of the property exceeds £500, the *ad valorem* duty according to the true value is payable, and no allowance can be made for the duty paid at first. But where 30*s.* has been paid and it is discovered that 50*s.* should have been paid, the difference only is payable. [See s. 16 (1), embodying and extending the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 35.] Where, however, the deceased died on or after the 1st September, 1903, and the Commissioners are satisfied that there were reasonable grounds for the original estimate of the value of the property, an allowance may be made for the duty paid at first. [See Revenue Act, 1903, s. 14.]"

Agricultural property in small estates.

Paragraphs 68—70 show how the value of agricultural property in small estates is assessed and may be paid. [See s. 61 (1) of Act of 1910.]

Exemption from other duties in cases not over £1,000 net.

"71. Where the NET value of the property, real and personal, on which Estate Duty is payable on the death of the deceased, exclusive of property settled otherwise than by the Will, if any, of the deceased, does not exceed £1,000, and the fixed duty or *ad valorem* Estate Duty has been paid upon the principal value of that estate, the Settlement Estate Duty and the Legacy and Succession Duties are not payable under the Will or intestacy of the deceased in respect of that estate. [See s. 16 (3).]"

SECT. 2.—*Of the Affidavit for the Commissioners of Inland Revenue.*

The Inland Revenue affidavit must be in the form provided by the Commissioners under s. 29 of the Act of 1881.

It is sworn in the Registry (Principal or District, as the case may be) of the Probate Division, and is to be delivered to the Probate Registrar on application for probate or letters of administration.

The forms in use for the Inland Revenue affidavit can be obtained of any collector of Inland Revenue, or by application to the Secretary, Estate Duty Office, London, W.C., or (with the exception of Form A—5, for second or subsequent grants, where the property was within the operation of a prior grant) at any Money Order Post Office outside the Metropolitan postal district.

The ordinary form of affidavit used for original grants requires a statement of the following particulars :—

Death and domicil.

(1) The death and domicil of the deceased.

Family.

(2) The family of deceased.

Personal property situate within the United Kingdom.

(3) A true account of the particulars and value as at the date of the deceased's death of all the personal estate of the deceased, whether in possession or reversion, within the United Kingdom, including personal property over which the deceased had exercised by Will an absolute power of appointment.

Personal or moveable property situate abroad saleable or transferable in the United Kingdom should be included in the above statement as " Personal property situate in the United Kingdom."

Foreign bonds.

Foreign government and railway bonds payable to bearer and marketable on the Stock Exchange, when physically situate in the United Kingdom at the death of the testator or intestate, are liable to Estate Duty even though the deceased was not a domiciled Englishman (*e*).

Locality of debts.

A simple contract debt is deemed to be within the area of the local jurisdiction within which the debtor for the time being resides and the locality of a specialty debt where the specialty is found at the time of the creditor's death (*f*).

(*e*) Winans *v.* The King, [1910] A. C. 27.

(*f*) Commissioners of Stamps *v.* Hope, [1891] A C. 476 ; and see *Re* Maudslay, Sons and Field, [1900] 1 Ch. 602.

(4) A true and particular list of debts owing at the time of the deceased's death to persons resident within, or contracted to be paid in, or charged on property within the United Kingdom. Debts owing within the United Kingdom.

(5) The value of the personal property after deducting the aggregate amount of debts and funeral expenses. Value of personal property.

(6) A true account of the particulars and value, as at the date of the deceased's death, of all the real property situate in England vested in the deceased without a right in any other person to take by survivorship, including real property over which the deceased executed by Will a general power of appointment, but exclusive of land of copyhold tenure or customary freehold where an admission or act of the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant. Particulars and value of real property situate in England.

(7) The aggregate gross value of the estate which by law devolves to and vests in the personal representative for or in respect of which the grant is to be made. Gross value of the estate.

(8) A true account of the particulars and gross value, as at the date of the deceased's death, of all the personal or moveable property of the deceased, whether in possession or reversion, situate out of the United Kingdom, including personal or moveable property over which the deceased had and exercised by Will an absolute power of appointment. Personal or moveable property situate out of the United Kingdom.

The English executors of a testator domiciled in England are to the extent of the assets in their hands liable to pay English Estate Duty and Settlement Estate Duty on foreign personalty, although expressly bequeathed to foreign executors and remains under their control (*g*).

(9) A true and particular list of debts owing to persons resident out of the United Kingdom, other than debts included in (4), *ante*, also a statement of the amount of any duty payable in any foreign country in respect of foreign assets. Debts owing out of the United Kingdom.

Immoveable property situate out of the United Kingdom is not chargeable with Estate Duty ; and if the deceased died Immoveable property situate out of the United Kingdom.

(*g*) *Re* Manchester (Dowager Duchess), [1912] 1 Ch. 540.

domiciled out of the United Kingdom no duty is payable in respect of the personal or moveable property situate out of the United Kingdom, and paragraphs (8) and (9) are then omitted from the affidavit (*h*).

Where a beneficiary died who was entitled under the Will of an English testator to a share of the proceeds of sale of a foreign tea estate given to English trustees upon trust for sale, with power to postpone sale and to manage and work the same, such share was held to be an English chose in action in respect of which Succession Duty, Estate Duty, and Settlement Estate Duty were payable (*i*).

The share of a deceased partner is situate where the business was carried on at the time of his death (*k*).

Debts otherwise secured.

(10) A statement that the debts are not such as are primarily payable out of any real property or debts in respect whereof there is a right to reimbursement and can be obtained from any other property or person.

A debt for payment out of which the deceased was surety only must not be deducted unless the executor has already paid it.

Other property of which deceased was competent to but did not dispose of.

(11) Any other personal property of which the deceased was at the time of his death competent to dispose within the meaning of the Finance Act, 1894, but of which he did not dispose.

General power to charge money.

(12) Particulars of any general power to charge money on real property.

This does not refer to the deceased's power in right of ownership to charge money on his own real property.

Where amount or value unascertained.

(13) An undertaking to bring in an account of any property where the amount or value has not been ascertained.

Other property.

(14) Particulars of any other property beyond that already referred to in respect of which Estate Duty is payable on the death of the deceased.

(*h*) See s. 2 (2) of the Finance Act, 1894, and Williams (10th ed.) 1742.

(*i*) Att.-Gen. *v.* Johnson, [1907] 2 K. B. 885.

(*k*) Stamp Duties Commissioners *v.* Salting, [1907] A C 449.

Inter vivos gifts within three years of death are property deemed to pass on the death. (See *ante*, p. 188.) Gifts *inter vivos*.

(15) A statement whether the representative elects to pay at once the whole of the Estate Duty on real property or other property in respect of which he has the right to defer payment under the Act. Election as to immediate or deferred payment.

(16) A true and particular list of charges at the deceased's death on leaseholds and on real property comprised in the above statements. Particulars of charges on leaseholds and real property.

(17) A statement how the same were created and whether they are primarily chargeable upon any other property, and whether there is a right of reimbursement capable of being obtained from any other property or person.

(18) Relates to the amount of duty (if any) payable in a British possession to which s. 20 of the Act of 1894 applies in respect of any property situate in such possession and which may be deducted from the Estate Duty payable in respect of the same property. Amount of colonial duty to be deducted.

(19) Relates to the amount of duty (if any) which may be deducted as having been paid or payable under the Act of 1881.

Corrective affidavits for Inland Revenue are required not only to correct errors in first affidavit, but also where the value at the time of the first affidavit cannot be conveniently ascertained. Corrective affidavit.

The form of corrective affidavit may be filled in and sent in unsworn in the first instance, and the commissioners may dispense with an oath in corrections of Estate Duty.

Sect. 11 of the Finance Act, 1894, provides as follows :— Certificate of discharge for estate duty.

"(1) The commissioners on being satisfied that the full Estate Duty has been or will be paid in respect of an estate or any part thereof shall, if required by the person accounting for the duty, give a certificate to that effect, which shall discharge from any further claim for Estate Duty the property shown by the certificate to form the estate or part thereof, as the case may be.

" (2) Where a person accountable for the Estate Duty in respect of any property passing on a death applies after the lapse of two years from such death to the commissioners, and delivers to them and verifies a full statement to the best of his knowledge and belief of all property passing on such death and the several persons entitled thereto, the commissioners may determine the rate of the Estate Duty in respect of the property for which the applicant is accountable, and on payment of the duty at that rate, that property and the applicant so far as regards that property shall be discharged from any further claim for Estate Duty, and the commissioners shall give a certificate of such discharge.

" (3) A certificate of the commissioners under this section shall not discharge any person or property from Estate Duty in case of fraud or failure to disclose material facts, and shall not affect the rate of duty payable in respect of any property afterwards shown to have passed on the death, and the duty in respect of such property shall be at such rate as would be payable if the value thereof were added to the value of the property in respect of which duty has been already accounted for.

" (4) Provided nevertheless that a certificate purporting to be a discharge of the whole Estate Duty payable in respect of any property included in the certificate shall exonerate a *bonâ fide* purchaser for valuable consideration without notice from the duty notwithstanding any such fraud or failure."

Sect. 3.—*Of Legacy and Succession Duties.*

How affected by domicil of testator.

Personal property follows the person and is to be considered as situate wherever the domicil of the proprietor is ; consequently if the deceased, whether a British subject or a foreigner, dies domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate and liable to the duties imposed by the statutes on legacies and successions ; and on the other hand, if he dies domiciled

abroad his personal property is exempt from these duties (*l*). This rule applies to a legacy given in exercise of a general power of appointment by a testator domiciled out of England, but it is different as to Succession Duty on a devolution of personal property under an English instrument in pursuance of a testamentary appointment ; the duty in that case being payable notwithstanding the appointor was domiciled abroad (*m*). So where the executor of a person domiciled abroad has under the Will collected foreign assets and invested them in English securities any subsequent devolution will make them liable to Succession Duty, though the party on whom they may devolve may (like the testator) be domiciled abroad (*n*), but not where the assets are merely brought here for distribution (*o*) or where though directed by the Will to be invested in England the assets have not actually beem transmitted and invested prior to the person ultimately entitled becoming entitled in possession (*p*).

Exemptions.

Under the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), s. 36, where payment of the sum of 30*s.* for the fixed duty on the affidavit or inventory in conformity with that Act has been made (see *ante*, p. 126) it shall be deemed to be in full satisfaction of any claim to Legacy Duty or Succession Duty in respect of the estate or effects to which such affidavit or inventory relates. And under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3), where the net value of the property, real and personal, in respect of which the estate duty has been paid upon the principal value thereof does not exceed £1,000, exclusive of property settled otherwise than by the Will of the deceased, no Settlement Estate Duty or Legacy or Succession Duty shall be payable under the Will or intestacy of the deceased in respect of that estate (*q*).

(*l*) Williams (10th ed.) 1850 ; and *ante*, p. 173. As to Estate Duty, see *ante*, pp. 188, 199.

(*m*) *Re* Wallop's Trust, (1864) 1 De G. J. & S. 656 ; Williams (10th ed.) 1851 *et seq.* and cases there cited ; and see *ante*, p. 182.

(*n*) Att.-Gen *v.* Campbell, (1872) L. R. 5 H. L. 524.

(*o*) Att.-Gen. *v.* Forbes, (1834) 2 Cl. & F. 48.

(*p*) Lyall *v.* Lyall, (1872) L. R. 15 Eq. 1.

(*q*) See *ante*, p. 197.

Instructions as to Legacy and Succession Duties are issued by the Commissioners of Inland Revenue. In the following summary, which contains additional observations and references, the instructions are enclosed in inverted commas.

Legacy Duty.

"Legacy Duty is payable in respect of any gift" (specific or pecuniary) "by Will which shall be satisfied out of the personal property of the deceased, or out of the personal property which the deceased shall have had power to dispose of as he or she shall think fit, whether the same be given by way of annuity, or in any other form, and in respect of every gift which shall take effect as a donation *mortis causâ*" (*r*).

Legacy Duty is not to be paid on any articles of plate, furniture, or other things not yielding any income and given to different persons in succession, whilst enjoyed in kind only by any persons not having any power of selling or disposing thereof (*s*).

Receipts to be taken.

"No person is to pay a legacy without taking a receipt for the same, expressing the date of the receipt, the name of the testator, the name of the person to whom the receipt is given, and of the person to whom the legacy is bequeathed, the amount or value of the legacy, and the amount and rate of the duty payable thereon" (*t*).

When duties are to be paid.

"The duties on legacies are to be accounted for at the time of paying, delivering, or otherwise discharging the legacies; but if by reason of infancy, or the absence of the legatees, or any other cause, the legacies cannot be paid, but are *retained* for the use of the legatees, the payment of the duties is not to be deferred till such legacies are actually paid, but the duties are to be accounted for when the legacies are so *retained*."

(*r*) See 36 Geo. III. c. 52, s. 7; 55 Geo. III. c. 184; Williams (10th ed.) 1770. As to sums applied for maintenance out of income under a discretionary trust see Att.-Gen. *v.* Wade, [1910] 1 K. B. 703.

(*s*) 36 Geo. III. c. 52, s. 14.

(*t*) *Ibid.*, s. 27; and see *post*, p. 215.

" A legacy payable to a legatee on his attaining the age of twenty-one years, or at some other future period, the interest of which is directed by the Will to be applied for the benefit of such legatee until the legacy becomes payable, being a vested legacy, the duty is payable on the amount or value of such legacy *immediately*, as a *retainer* of the legacy in trust for the use of the legatee, and the office form for the payment of the duty is to be filled up and signed."

Legacy to an infant.

" The value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, must be ascertained by the tables annexed to the 16 & 17 Vict. c. 51, and the duty is to be paid on such value by equal instalments out of the first four annual payments of the annuity " (*u*).

How annuities are to be valued.

" Any legacy or residue given to different persons in succession, liable to the *same* rate of duty, is to be charged with duty on the amount thereof, as in the case of a legacy to one person. And if any legacy or residue be given to different persons in succession, liable to *different* rates of duty, they who take for life only or other temporary interest, are to pay as annuitants ; and when any person or persons shall become entitled to the principal, or when upon the death of a tenant for life all the remaining persons in the succession shall be liable to the *same* rate of duty, then the duty must be paid upon the *principal*, as if the same had come to them immediately on the death of the testator " (*x*).

Legacy to different persons in succession.

Where a remainder is to a contingent class with a possible intestacy, should the contingent class fail, and in that event involving a different rate of duty, the life interest is chargeable by way of annuity (*y*).

" A legacy given subject to any contingency which may defeat the gift, is nevertheless to be charged with duty as *an absolute bequest*, and the duty is to be paid out of the capital of such legacy ; and should the contingency after-

Legacy subject to contingency which may defeat gift.

(*u*) 36 Geo. III. c. 52, ss. 8—10 ; Williams (10th ed.) 1771.

(*x*) *Ibid.*, ss. 12—16 ; Williams (10th ed.) 1773 *et seq.*

(*y*) *Re* Duppa, [1912] 2 Ch. 445.

wards happen, and the legacy go to one liable to a higher rate of duty, such legatee is to pay the difference " (*z*).

Assignee of a reversion.

On an assignment of a reversion, the legacy duty which becomes payable in respect thereof on it falling into possession, in the absence of express agreement, falls on the assignee without any claim for indemnity (*a*).

Residue.

Legacy Duty is payable on the clear residue (when devolving to one person) and on every share of the clear residue (when devolving to two or more persons) of the personal estate (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy (*b*).

How to account for residue.

" For the payment of the duty on the residue, a statement of the deceased's personal estate and the moneys arising from the sale or mortgage of real estate, *or the value* of the real estate *if not sold*, when the same is directed by the Will or codicil to *be sold or mortgaged*, and of all payments made thereout, is to be rendered on the office printed Residuary Form No. 3, together with a *duplicate* thereof, and the duty when assessed on the amount or value of the clear residue must be paid *within fourteen days* after such assessment *under a penalty of treble the value of the duty*."

For obvious reasons the Acts do not specify any time within which the Residuary Account is to be rendered.

Rents, dividends, &c. to be accounted for until duty is computed.

Legacy Duty is chargeable upon the amount or value of the property as it stands with its accretions of income at the time when the duty is computed, and not as the property stood at the time of the death of the deceased, and in rendering an account, all investments which shall have been made of any part of the deceased's personal estate, and all dividends, interest, and profits arising from the personal estate of the deceased, subsequent to the time of the deceased's death, and all accretions thereof down to the time

(*z*) Sect. 17.
(*a*) *Re* Repington, [1904] 1 Ch. 811.
(*b*) 55 Geo. III. c. 184; Williams (10th ed.) 1765.

of the computation of the duty thereon, must be considered as part of the deceased's personal estate, and be accounted for accordingly.

But where by Will a specific debt is forgiven, which is known and ascertained at the time of the testator's death, Legacy Duty is not payable upon the interest accruing in respect of such debt between the time of such death and the period when the executors close their accounts (*c*).

When and how effects to be valued.

" Effects, not consisting of money or securities for money, and not sold, are to be valued at the time the account is rendered ; when inventories and proper valuations thereof will be required to be produced."

Where residue is given for life distinct account to be kept of rents, dividends, &c.

" Where the residue of the personal estate is given to one for life, and afterwards to others, a distinct account must be given of the rents, dividends and interest accrued subsequent to the death of the testator, and of the payments thereout for interest of legacies, and for interest of the testator's debts, accrued after his decease, so that the balance due to the residuary legatee for life may be clearly ascertained, and the proper duty charged thereon."

No legacy specifically bequeathed to be included in the residue without giving notice.

" If any legacy specifically bequeathed shall be included in the account of residue by reason of the same being given to the residuary legatee, or of the person entitled to the legacy and the residuary legatee being liable to the *same* rate of duty, *it will be necessary,* in order that such legacy may be discharged in the books of the Estate Duty Office, and to *prevent the executors from being afterwards called upon to account for the duty on such legacy,* to attach a note to the residuary statement describing the legacy and stating the same to be included in the account."

Legacies payable out of mixed fund of residue.

A general direction to pay legacies out of a mixed fund of residue charges them rateably on the portions attributable to realty and personalty (*d*), and Legacy Duty is to be paid on so much of the bequest as, according to the apportionment, falls to be satisfied out of the personal property, and

(*c*) See Williams (10th ed.) 1832. 130 ; and see *post,* p. 349.
(*d*) *Re* Spencer Cooper, [1908] 1 Ch.

Succession Duty is to be paid on so much as falls to be satisfied out of the proceeds of sale of the real property.

Money left to pay duty.

Money left to pay Legacy Duty, so that the legatee may take the legacy free of duty, is not chargeable with Legacy Duty (*e*).

Legacies to bodies corporate to be preserved.

Legacies of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, to any body corporate or to any of the Inns of Court, or any endowed school, to be kept and preserved and not for the purposes of sale, are not liable to Legacy Duty (*f*).

Succession Duty.

Legacies charged on real property.

"Where real property is charged in aid of personal property with the payment of pecuniary legacies, Succession Duty is to be paid on such proportion of the legacies as falls to be satisfied out of the real property so charged."

As to persons dying on or after the 1st July, 1888, legacies payable out of or charged upon real estate, or the proceeds thereof, are not chargeable with Legacy Duty but with Succession Duty (*g*).

Money payable by devisee as a condition or by way of election.

Although where under the doctrine of election a legatee surrenders his own property Legacy Duty is not payable on the personal property of the legatee so given up, yet where a testator devises his own real estate to A. and bequeaths A.'s personal estate to B., formerly Legacy Duty, and now Succession Duty, is payable on the value of the personal estate so charged on the testator's real estate (*h*). The same principle applies and duty is payable where a sum of money is to be paid by a devisee to a legatee as a condition of the devise (*i*).

Leaseholds.

Leasehold property is chargeable with Succession Duty as

(*e*) 36 Geo. III. c. 52, s. 21; and see *post*, p. 460.

(*f*) 39 Geo. III. c. 73; and see Finance Act, 1894, s. 15, as to power to remit Estate Duty.

(*g*) 51 & 52 Vict. c. 8, s. 21 (*r*).

(*h*) Laurie *v.* Clutton, (1851) 15 B. 131.

(*i*) Att.-Gen. *v.* Wyndham, (1862) 1 Hurl. & C. 571; and see Williams (10th ed.) 1838, n. (*o*).

real property under the Succession Duty Act, instead of with Legacy Duty (*k*).

"Real property." "The term 'real property' includes all freehold, copyhold, customary, leasehold, and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland (except money secured on heritable property in Scotland), and all estates in any such hereditaments" (*l*).

"Personal property." "The term 'personal property' does not include leaseholds, but includes money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property" (*m*).

"Property." "The term 'property' alone includes real property and personal property" (*n*).

"Trustee." "The term 'trustee' includes an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust.

"Succession." The term 'succession' denotes any property chargeable with duty under the Act 16 & 17 Vict. c. 51" (*o*).

What dispositions and devolutions of property confer successions. "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying on or after the 19th day of May, 1853, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying on or after the 19th day of May, 1853, to any other person in possession or expectancy, is deemed to have conferred or to confer on the person entitled by reason of any such disposition, or devolution, a 'succession': and the term 'successor' denotes the person so entitled: and the

(*k*) 16 & 17 Vict. c. 51, ss. 1, 19.
(*l*) *Ibid.*, s. 1.
(*m*) *Ibid.*
(*n*) *Ibid.*
(*o*) *Ibid.*

term 'predecessor' denotes the settlor, disponer, testator, obligor, ancestor, or other person, from whom the interest of the successor is or shall be derived" (*p*).

Joint tenants.

"Joint tenants, taking by survivorship, are deemed successors" (*q*).

Powers.

"Powers of appointment, when executed, confer successions" (*r*).

Dower and other charges.

"Extinctions of determinable charges, such as dower, widow's jointure, rentcharges, annuities, and other charges, whether of income or principal, confer successions" (*s*).

Reservation of any benefit.

"Dispositions, accompanied by the reservation of a benefit to the maker, confer successions" (*t*).

Secret trusts or other evasions.

"Dispositions to take effect at periods dependent on death, or made with an engagement, secret trust, or arrangement, or made for evading duty, confer successions" (*u*).

Alienation or sale of reversions.

"If reversionary property, expectant upon death, be vested by alienation, or other derivative title, in any person other than the person originally entitled under the beforementioned dispositions or devolutions, the Succession Duty is to be payable at the same rate and time as if no such alienation had been made, or derivative title created" (*x*).

Proceeds of sale of real property.

"Succession Duty is payable in respect of successions to real and personal property passing upon the death of any person, and in respect of charges on real property made by any person, dying on and after 1st July, 1888, whether in exercise of any power or otherwise, and on the proceeds of sale, or principal value of real property directed to be sold by the Will of any person so dying, or sold under a power contained in such Will, whether given by way of annuity or in any other form" (*y*).

Duty a first charge.

The duty on a succession to real or leasehold property is a first charge on the interest of the successor in the property;

(*p*) Sect. 2.
(*q*) Sect. 3.
(*r*) Sect. 4.
(*s*) Sect. 5.
(*t*) Sect. 7.
(*u*) Sect. 8, but see *post*, p. 215, as to the rate of duty where there is a secret trust.
(*x*) Sect. 15, and see Williams (10th ed.) 1809
(*y*) Sect. 4, and see Williams (10th ed.) 1794, 1802.

and the successor and trustee, &c., are accountable for its payment (*z*).

Mode of payment.

"The duties on successions to personal property, charges on real property, and to money from the sale of real property under any trust for sale, are to be paid in the same manner as the duties on legacies."

Successor to real property to pay on life value.

"The interest of a successor in real property, not subject to a trust for sale, is considered as an annuity, equal to the annual value for his life or for any lesser period during which he shall be entitled thereto, and the value of such annuity is calculated by the tables annexed to the Succession Duty Act, and the duty chargeable thereon is payable by eight equal half-yearly instalments, the first to be paid twelve months next after the successor shall become entitled to the beneficial enjoyment, and the seven following instalments at half-yearly intervals of six months each, from the day when the first instalment becomes due, or at the option of the successor, by two equal moieties, whereof the first moiety shall be paid by four equal yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the three following instalments at yearly intervals to be computed from the day on which the first instalment shall have become payable; and the second moiety shall be paid on the day for payment of the last instalment of the first moiety, or, if not so paid, shall be payable by four equal yearly instalments, with interest at the rate of three pounds per centum per annum from such last-mentioned day on so much of the second moiety as shall for the time being remain unpaid, the first of such instalments, with the interest, to be paid at the expiration of twelve months from that day."

Instalments unpaid at death of successor.

"If a successor, not competent to dispose by Will of a continuing interest in the property, die before all the eight half-yearly instalments be due, the remaining payments

(*z*) Sect. 42.

cease ; or, in the event of his exercising his option to pay by two equal moieties, and dying before the day for payment of the last instalment of the first moiety of duty, the duty is reduced by so much as would have ceased to be payable if the duty had been payable by eight half-yearly instalments " (*a*).

" But in the case of a successor who shall have been competent to dispose by Will of a continuing interest in the property, the instalments of duty unpaid at his death do not cease to be payable " (*b*).

All necessary out-goings to be deducted.

" In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rentcharges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance will be made of all necessary out-goings " (*c*).

Timber.

" The Succession Duty for timber (not being coppice or underwood, yielding profit yearly), is to be paid upon sales exceeding £10 yearly. The whole duty may be commuted " (*d*).

Duty is only chargeable under s. 23 in respect of timber sold, and does not attach to growing trees sold with the property. It does not extend to the sale moneys of timber from trees which were not growing upon the property when the successor became beneficially entitled in possession.

Advowsons.

" The Succession Duty on advowsons, when sold, is payable on the purchase money " (*e*).

Fines on renewals of leases, &c.

" Where property is subject to lease, and a further lease is made, Succession Duty is payable on fine, &c." (*f*).

Manors, mines, and other fluctuating incomes.

" The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income, is to be calculated upon an average of past profits or income as shall be agreed upon ; but where the circumstances do not admit of such agreement recourse is to be had to a per-centage upon the saleable value " (*g*).

(*a*) Sect. 21 ; 51 Vict. c. 8, s. 22.
(*b*) 57 & 58 Vict. c. 30, s. 18.
(*c*) 16 & 17 Vict. c. 51, s. 22.
(*d*) Sect. 23.
(*e*) Sect. 24.
(*f*) Sect. 25.
(*g*) Sect. 26.

"Sums charged on real property, and money from the sale of real property under any trust for sale, are chargeable with duty as successions to personal property" (*h*). Charges on real property and money from the sale thereof.

"The regulations for the payment of duty on legacies apply to successions to personal property."

"No allowance is to be taken for any incumbrance created or incurred by the successor, but allowance may be taken for all other incumbrances. Against real property, only the annual interest of the incumbrance is to be deducted" (*i*). Allowance of incumbrances.

"Accountable persons are to give notice of successions to the Commissioners of Inland Revenue or their officers, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of personal property, or any part thereof, to or for the successor or any person in his right; and in the case of real property when duty shall first become payable; and deliver a full and true account of the property, for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed, together with the names of the successor and predecessor and their relation to each other, and all such other particulars as shall be necessary or proper to ascertain the duties fully and correctly" (*k*). Trustees, &c. to make returns and deliver accounts of property.

"The penalty for not giving notice or delivering an account, is, for every month of delay, £10 per cent. upon duty calculated as if payable at the rate of £1 per cent." (*l*). Penalty.

Proper forms for payment of Legacy and Succession Duties can be obtained on application to the Estate Duty Office, Somerset House. When the forms are properly filled up they should be transmitted by post, addressed "The Secretary, Estate Duty Office, Somerset House, London, W.C.," for examination, and when the receipts and accounts are found to be correct, instructions for the payment of the duty will be given. How forms can be obtained.

(*h*) Sect. 29.
(*i*) Sects. 34, 35.
(*k*) Sect. 45.
(*l*) Sect. 46.

Rates of Duty payable on Legacies, Annuities, and Residues.

"If the deceased died on or after the 1st June, 1881, every pecuniary legacy or residue, or share of residue, although not of the amount or value of £20, is chargeable with duty by the 44 Vict. cap. 12, sec. 42. Where the whole of the personal property does not amount to £100 no Legacy Duty is chargeable (43 Vict. cap. 14, sec. 13.)" (*m*).

Rate of duty.

Prior to the Act of 1910 (see *post*, p. 216) the following were the rates of duty, and in filling up the legacy receipts, and the declaration in the residuary account, the consanguinity or description of the legatee or annuitant *must be* in the following words of the Act :—

Children of the deceased, or their descendants, or the father or mother or other lineal ancestor of the deceased	£1 per cent.
Brothers and sisters of the deceased, or their descendants ..	£3 per cent.
Brothers and sisters of the father or mother of the deceased, or their descendants	£5 per cent.
Brothers and sisters of a grandfather or grandmother of the deceased, or their descendants	£6 per cent.
Persons in any other degree of collateral consanguinity, or strangers in blood to the deceased	£10 per cent.

Persons otherwise chargeable with duty at the rate of £1 per cent. are exempt in respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects upon the value whereof duty shall have been paid on the affidavit or inventory in conformity with the Act 44 Vict. c. 12.

Release of legacy.

The Act 36 Geo. III. c. 52, s. 23, enacts that where a legacy shall be released for consideration or compounded for less than the amount or value thereof the duty shall be paid in respect of the legacy according to the amount taken in satisfaction thereof. Where a claim to a legacy is released or compromised under this section duty is to be paid at the rate which is applicable to the person in whose favour the release or compromise is made, and only on the benefit which he has received (*n*).

(*m*) And see *ante*, pp. 126, 203.

(*n*) Lord Adv. *v.* Murray, [1896] W. N. 110.

Title under a secret trust.

It is material to point out that where there is a secret trust, or where there is a right created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to fraud, the title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the Will, and which cannot be correctly termed testamentary (*o*). The rate of duty depends on the consanguinity of the legatee, therefore by such a secret trust, or personal confidence, the parties may escape from payment of duty altogether, or very nearly so, by a testator giving the property to his wife (in which case there is no duty payable) or to a child (in which case the duty is only 1 per cent.), although it may really be intended to give it to strangers in blood (*p*).

Penalties.

" Persons paying or receiving any legacy, residue or share of residue liable to duty, without taking or signing the proper receipt for the same, will be subject to a penalty of £10 per cent. on the amount or value of such legacy, residue, or share of residue " (*q*).

" Every legacy receipt must be dated on the day of signing, and the duty thereon paid within twenty-one days from the date thereof, under a penalty of £10 per cent. on the amount of the duty ; and if the duty shall not be paid within three months from the date of the receipt, a penalty will then be incurred of £10 per cent. on the amount or value of the legacy " (*r*).

" The Commissioners of Inland Revenue cannot under any circumstances stamp a receipt on which the duty shall not be paid within twenty-one days from the date, unless the penalty incurred be also paid " (*s*).

(*o*) Cullen *v.* Att.-Gen., (1866) L. R. 1 H. L. 190, per Ld. Westbury.
(*p*) *Ibid.*, see per Ld. Cranworth.
(*q*) 36 Geo. III. c. 52, s. 28, and see *ante*, p. 204.
(*r*) Sect. 29.
(*s*) Sect. 30.

Rates of Duty payable on Successions to Real and Personal Property, Charges on Real Property, and Money derived from the Sale of Real Property.

"If the deceased died on or after the 1st June, 1889, every succession, although the value thereof shall be less than £20, is chargeable with duty by 52 Vict. c. 7, s. 10 (2)."

"Where the whole succession or successions derived from the same predecessor upon any death shall not amount in money or principal value to £100 no Succession Duty is chargeable (16 & 17 Vict. c. 51, s. 18.)."

Rate of duty.

Prior to the Act of 1910 the following were the rates of duty, and in filling up accounts the consanguinity or description of the successors *must be* in the following words of the Act :—

Brothers and sisters of the predecessor or their descendants..	£3 per cent.
Brothers and sisters of the father or mother of the predecessor or their descendants	£5 per cent.
Brothers and sisters of a grandfather or grandmother of the predecessor or their descendants	£6 per cent.
Persons of more remote consanguinity or strangers in blood ..	£10 per cent.

Amendment of rates of legacy duty and succession duty.

By s. 58 (sub-s. 1) of the Act of 1910 any Legacy or Succession Duty payable at the rate of 3 per cent. shall be payable at the rate of 5 per cent., and any Legacy or Succession Duty payable at the rate of 5 per cent. or 6 per cent. shall be payable at the rate of 10 per cent. on the amount or value of the legacy or succession.

Husband or wife of deceased or lineal ancestor or descendant.

The husband or wife of the deceased or a lineal ancestor or descendant is now chargeable with duty at 1 per cent. unless the property passing for estate duty does not exceed £15,000 in principal value, or the individual benefit, whatever may be the principal value of the property passing, does not exceed £1,000, or £2,000 in the case of a widow or child under twenty-one years of age (see s. 58 (sub-ss. 2, 3, 4)).

How duty to be paid.

"Money should not be remitted until the proper accounts have been delivered by the parties, and the amount payable and the mode of payment have been notified to them."

"The liability to account for and pay duty in no way depends upon application being made by the commissioners."

"Interest, at the rate of £3 per cent. per annum, must be added on all duties in arrear. (59 & 60 Vict. c. 28, s. 18.)" Interest on duty in arrear.

Sect. 12 of 43 Vict. c. 14 provides that "When an executor administrator or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to Legacy Duty or Succession Duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund. Such certificate shall not in any way affect the liability of any person other than the person in whose favour it is expressed to be given." Certificate of discharge from liability to legacy or succession duty on distribution of a fund.

Sect. 14 of 52 & 53 Vict. c. 7 provides that "No person shall under a testamentary document admitted to probate, or under letters of administration, or under a confirmation, be liable for payment of any Legacy or Succession Duty, or duty imposed by this Act, after the expiration of six years from the date of the settlement of the account in respect of which the duty is payable, where such account was in all respects a full and true account and contained all the facts material to be known by the Commissioners of Inland Revenue for the ascertainment of the rate and amount of duty; and no trustee, executor, or administrator shall, after the expiration of such six years, be liable to such duty if it is proved to the satisfaction of the commissioners that the account rendered was correct to the best of his knowledge, information, and belief." No liability after 6 years from settlement of account.

All information furnished to the commissioners for revenue purposes is confidential. Copies of affidavits or accounts are supplied to the parties who delivered them, or to their solicitors applying on their behalf, but not to other Disclosure of contents of affidavits and accounts.

persons without the written consent of such parties, or, if they are dead, the written consent of their legal personal representatives (*t*).

Production on subpœna of documents.

The practice of the commissioners is to decline to produce documents relating to revenue matters on subpœna unless the judge at the trial should think any particular document ought, in the interest of justice, to be produced (*u*).

The commissioners may refuse to produce documents on the ground that to do so would be prejudicial to the public service (*x*).

(*t*) Williams (10th ed.) 1762.
(*u*) *Ibid.*
(*x*) Brown's Trustees *v.* Inland Revenue, (1897) 35 Sc. L. R. 340; 3 Tax. Cas. 598.

CHAPTER XIII.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

SECT. 1.—*Of the Time of Vesting.*

Property vests in executor from moment of testator's death.

As the interest of an executor in the estate of the deceased is derived exclusively from the Will it vests in him from the moment of the testator's death.

Property vests in administrator from time of grant.

On the other hand an administrator derives his title wholly from the Court; he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant (*a*).

Until grant personal estate of intestate vests in judge of Court of Probate.

By 21 & 22 Vict. c. 95, s. 19, "From and after the decease of any person dying intestate and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being in the same manner and to the same extent as heretofore they vested in the Ordinary."

Property of personal chattels draws to it the possession.

All moveable goods vest in the executor in possession immediately upon the testator's death; for it is a rule of law, that the property of personal chattels draws to it the possession. It is otherwise of things immoveable, as leases for years of land or houses; for of these the executor or administrator is not deemed to be in possession before entry (*b*). But a reversion of a term, which the testator granted for part of the term, is in the executor immediately by the death of the testator (*c*).

No possession of immoveables before entry; except leasehold reversion.

When letters of administration will relate back:

For particular purposes the letters of administration relate back to the time of the death of the intestate (*d*).

(*a*) Williams (10th ed.) 467, 468; Woolley *v.* Clark, (1822) 5 B. & Ald. 744.

(*b*) Williams (10th ed.) 472, 473.

(*c*) Prattle *v.* King, (1681) Sir T. Jones' Rep. 169.

(*d*) See *ante*, p. 109, as to what an administrator may do before grant.

in actions for trespass or trover;

Thus, an administrator may have an action of trespass (*e*) or trover for the goods of the intestate taken before letters granted to him; otherwise there would be no remedy for the wrong done (*f*).

in actions on covenants in leases;

So the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate, and so as to render him liable to account for the rents and profits of it from the death of the intestate (*g*).

in actions on contracts.

So where a person, acting on behalf of the intestate's estate, enters into a contract before grant of administration, on letters of administration being granted to him the administration will have relation back, so as to entitle him as administrator to sue upon it (*h*).

The relation back must be for the benefit of the estate.

But this doctrine of relation back on the grant of administration would seem to apply only where it is for the benefit of the estate, and to enable the administrator to sue for its protection (*i*).

In *Re Watson* (*j*) it was stated by Wills, J., to be a principle of law that where work is done on the credit of the estate by the order of one who afterwards obtains administration and ratifies the contract, the estate is bound if the work done is for the benefit of the estate. In that case, however, the administrator refused to ratify work done by a solicitor relating to the estate before the grant of administration, and it was held the solicitor could not recover. This decision was affirmed on appeal (*k*), but Lord Esher, M.R., doubted whether the administrator, after he became administrator, and so was acting in the interests of other persons,

Doubtful whether administrator can ratify

(*e*) Tharpe *v.* Stallwood, (1843) 12 L. J. (N. S.) (C. P.) 241, where all the authorities are considered.

(*f*) Long *v.* Hebb, (1652) Sty. 341; Foster *v.* Bates, (1843) 12 M. & W. 226, 233; and see Williams (10th ed.) 469.

(*g*) See Rex *v.* Horsley (Inhabitants of), (1807) 8 East, 405, 410, per Ld. Ellenborough.

(*h*) Bodger *v.* Arch, (1854) 10 Exch. 333; and see also Foster *v.* Bates, *ubi sup.*

(*i*) Morgan *v.* Thomas, (1853) 17 Jur. 283.

(*j*) (1886) 18 Q. B. D. 116.

(*k*) 19 Q. B. D. 234.

could have ratified a prior contract made with himself ; and Lindley, L.J., said, " We have not to determine whether if the administrator had decided to pay these costs he could have recovered them from the estate."

prior contract so as to render the estate liable.

There is no general equitable principle that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it (*l*) ; and there is certainly no rule of law or principle of equity which obliges the administrator to pay, as administrator, for work which he has not ordered and which has not been done for him (*m*).

It would seem that as to real estate coming within the operation of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, in the absence of and until the constitution of a personal representative of the deceased the legal estate will devolve on the heir-at-law (*n*) ; and that upon administration being taken out, the grant will have the effect of vesting the land in the administrator by relation, so as to enable him to bring actions in respect of that property for matters affecting the same subsequent to the death of the intestate (*o*).

As to real estate of intestate, until grant it vests in heir-at-law.

The grant vests it in administrator, with right to sue for matters subsequent to death.

But the relation back shall not divest any right legally vested in another between the death of the intestate and the commission of administration ; for instance, an execution sued out on the goods of the tenant of an intestate landlord before grant of administration has priority to the administrator's right on his appointment to a year's rent under 8 Anne, c. 17 (*p*).

Right legally vested in meantime not divested by relation back.

Although on the grant of letters of administration the administrator is entitled to all the rights which the intestate had at the time of his death vested in him, yet no right of

No right of action accrues to administrator until grant.

(*l*) See *Re* English and Colonial Produce Co., Ltd., [1906] 2 Ch. 435. *Re* National Motor Mail-Coach Co., Ltd., [1908] 2 Ch. 515.

(*m*) *Re* Watson, (1887) 19 Q. B. D. 234, 236, per Ld. Esher, M.R.

(*n*) See per North, J., in John *v.* John, [1898] 2 Ch. 573, 576.

(*o*) See per Stirling, L.J., In the Goods of Pryse, [1904] P. 301, 305.

(*p*) Waring *v.* Dewbury, (1717) Gilb. Eq. Rep. 223 ; Williams (10th ed.) 471.

Effect on Statute of Limitations.

action accrues to the administrator until he has obtained the grant. Consequently in an action for wrongful conversion (*q*), or in an action on a bill of exchange payable to but accepted after the death of the deceased (*r*), the Statute of Limitations begins to run from the date of administration, and not from the day of the wrongful conversion of the goods of the deceased or the day of payment of the bill.

But the stat. 3 & 4 Will. IV. c. 27 ("An Act for the limitation of actions and suits relating to real property and for simplifying the remedies for trying the rights thereto"), s. 6, enacts that "for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." This section applies to an administrator claiming a chattel interest in land (*s*), and to cases arising under s. 40 as well as to cases arising under the earlier part of the Act (*t*), but not to any claim not within the purposes of the Act.

Sect. 2.—*Of the Quality of the Estate.*

Interest of executor or administrator merely to minister and distribute.

The interest of an executor or administrator in the goods of his testator or intestate is not the same as in his own goods; the reason given is, that he has them not in his own right but in the right of another; that "by law he is but the minister and dispenser and distributor of these goods" (*u*). Consequently writs of execution upon judgments against executors are to levy so much of the goods of the testator in his hands to be administered; considering them, in his hands, still as the testator's. And the goods of

Consequent effect: on writs of execution upon judgments;

(*q*) Pratt *v.* Swaine, (1828) 8 B. & C. 285.

(*r*) Murray *v.* East India Co., (1821) 5 B. & Ald. 204.

(*s*) *Re* Williams, (1886) 34 C. D. 558

(*t*) *Re* Bonsor and Smith's Contract, (1884) 34 C. D. 560 in note; and see *post*, pp. 443, 449, 452.

(*u*) Pinchon's Case, 9 Rep. 88 b.; Wentw., Off. Ex. 192 (14th ed.).

a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right (*x*). So if the executor die intestate, or on the death of an administrator, the goods of his testator, or intestate, vest not in his administrator, but in the administrator *de bonis non* of the original testator or intestate (*y*). And even before the stat. 33 & 34 Vict. c. 23, if he committed felony, or treason, although he forfeited his own goods, yet those which he had as executor or administrator were not forfeited (*z*).

in making grants *de bonis non*;

in cases of felony or treason.

Where an executor carries on a business under the directions contained in the Will of the testator, and in that character contracts a debt, the debt is one for which an action must be brought against the executor personally, for which judgment must be obtained *de bonis propriis* of the executor, and no action can be successfully brought against the executor as executor, and no execution can be had *de bonis testatoris*, since the debt was not the debt of the testator, and the execution creditor has no right to have goods held by the executor upon trust taken in execution.

As to debts incurred by executor in carrying on testator's business.

Executors who continue to carry on their testator's business under the powers of his Will in the same firm name in which he had carried it on are not liable to be adjudicated bankrupt as partners, but as joint debtors they may be individually proceeded against and made bankrupt (*a*).

The right of the executor to indemnity out of the assets of the testator, and of the creditor to stand in his place to that extent, is another matter. Should the executor become bankrupt this right will pass to his trustee in bankruptcy as against an execution creditor (*b*).

Indemnity.

Lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the Will, coupled with the consent of the beneficiaries, may raise an inference of a gift

Inference of gift by beneficiaries of assets so as to render them

(*x*) Farr *v.* Newman, (1792) 4 T. R. 621.

(*y*) See *ante*, p. 133.

(*z*) See *ante*, p. 24; Williams (10th ed.) 474.

(*a*) *Re* Fisher & Sons, [1912] 2 K. B. 491.

(*b*) *Re* Morgan, (1881) 18 C. D. 93; Jennings *v.* Mather, [1902] 1 K. B. 1; and see *post*, p. 430.

liable to execution for executor's own debt.

of the assets by them to the executor and entitle his judgment creditor to take them in execution (*c*).

Similar inference from conduct of testator's creditors.

A similar inference may be drawn from the conduct of the testator's creditors to the executor, so as to preclude them restraining a creditor of the executor from selling the testator's leaseholds under an execution for his own debt (*d*).

Deceased's assets unaffected by bankruptcy of executor or administrator.

On the bankruptcy of an executor or administrator the property passing to the trustee in the bankruptcy does not include the property of the deceased, since being property held by the bankrupt on trust for other persons it is not property which can be in the order and disposition of the bankrupt with the consent of the true owner and divisible among his creditors (*e*). But where the bankrupt held property on any trust for his own benefit, as where he held property to secure his own right of indemnity in priority to all claims of his *cestui que trust*, and the retention of such property (*e.g.*, leaseholds with onerous covenants) is necessary to give full effect to such right, the legal estate in the property and right of possession vest in the trustee in bankruptcy to the extent to which they were vested in the bankrupt (*f*).

Mode of application of assets where deceased was partner in business.

Where the deceased carried on business in partnership and the business after his death is continued by the surviving partner, who subsequently becomes bankrupt, the settled rule is that the joint estate must be applied in payment of joint creditors, and the separate estate in payment of separate creditors (*g*), and the same rule applies where both the deceased and surviving partners' estates are insolvent (*h*).

Moreover the rule that a partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm, who are in fact his

(*c*) *Re* Morgan, (1881) 18 C. D. 93.

(*d*) Ray *v.* Ray, (1815) Coop. 264.

(*e*) See 46 & 47 Vict. c. 52, s. 44 (1) and (iii.); Kitchen *v.* Ibbetson, (1873) L. R. 17 Eq. 46, 49.

(*f*) St. Thomas's Hospital (Governors) *v.* Richardson, [1910] 1 K. B. 271.

(*g*) *Ex parte* Morley, (1873) L. R. 8 Ch. 1026; *Re* Mellor, (1879) 12 C. D. 917; 13 C. D. 465; and see *post*, pp. 229, 417.

(*h*) Ridgway *v.* Clare, (1854) 19 Beav. 111.

own creditors, applies in a case where a partner had died before the bankruptcy and the money due in respect of his share under the partnership deed had not been paid to his executors by the other partners at the time of the bankruptcy (*i*), but it does not apply where the debts of the joint creditors are statute-barred as against the deceased partner's estate (*k*), or where the proof against the separate estate of the surviving partner is in respect of a devastavit committed by him in wrongfully employing the separate property of the deceased in the business (*l*).

As to merger.

So in respect to land, no merger can take place of the estate held by a man as executor or administrator in that which he holds in his own right, yet when the executor or administrator is the only person entitled, as residuary legatee, or next-of-kin, to the beneficial ownership, and all the debts are paid, he will have the term in his own right, and it may become merged if such is the intention (*m*).

Executor or administrator cannot elect to take specific chattels as compensation for sums owing to him:

but executor is not bound to realise before exercising his right of retainer;

Notwithstanding a statement in Toller (*n*), and dicta in old cases (*o*), to the effect that at law an executor paying with his own money a debt of his testator may elect to take any specific chattel as a compensation, the equitable rule, which now prevails, would seem to be that in such case he cannot acquire as a purchaser an absolute title to specific chattels (*p*). But where the debt due to the executor of an insolvent testator exceeds the value of the testator's assets, the executor is not bound to realise the assets, *i.e.*, convert them into money, before exercising his right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt (*q*).

and administrator cannot appropriate specific

In *Elliott* v. *Kemp* (*r*) Parke, B., is reported to have said

(*i*) Nanson *v.* Gordon, (1876) 1 App. Cas. 195.

(*k*) *Re* Hepburn, (1884) 14 Q. B. D. 394.

(*l*) *Ex parte* Westcott, (1874) L. R. 9 Ch. 626.

(*m*) See Williams (10th ed.) 478, and *post*, p. 282.

(*n*) Toller (5th ed.) 238.

(*o*) Elliott *v.* Kemp, (1840) 7 M. & W. 306, 313, per Parke, B.; and see Williams (10th ed.) 482.

(*p*) Hearn *v.* Wells, (1844) 1 Coll. 333, per Knight Bruce, V.-C.

(*q*) *Re* Gilbert, [1898] 1 Q. B. 282; approved in *Re* Rhoades, [1899] 2 Q. B. 347.

(*r*) (1840) 7 M. & W. 306, 313.

chattels to himself as his own share as next-of-kin.

that an administratrix might acquire a title to chattels by appropriating them to herself as her own share without any agreement with the other next-of-kin entitled under the Statutes of Distribution. But it is submitted that an administrator cannot so appropriate except by agreement with the other persons entitled to share, since it would in effect be constituting himself a purchaser thereof from himself, which the law does not allow (*s*).

Sect. 3.—*Of the Quantity of the Estate.*

Whole personal estate and such real estate as is affected by the Land Transfer Act, 1897, vest in executor or administrator.

The whole of the personal estate of the deceased vests in his personal representative or representatives, and in the case of deaths after the 31st December, 1897 (that is after the commencement of the Land Transfer Act, 1897), the whole of the real estate also (including any real estate over which the deceased has exercised a general power of appointment), other than and except land of copyhold tenure or customary freeholds in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (*t*), but including equitable estates or interests in copyholds (*u*).

But not a joint estate.

Property in which the deceased had merely a joint estate or interest passes to the survivor, and does not vest in the deceased's personal representative (*x*).

To what extent equity follows the law with regard to joint tenancy.

Except in the case of trusts executory, limitations which confer an estate in joint tenancy at law will have the same effect in equity, when there are no circumstances which afford grounds for a departure from the rule of law ; so that where two or more persons purchase lands, and advance the money in equal shares, and take a conveyance to them and their heirs, there is a joint tenancy (*y*). But joint tenancy is not favoured in equity, and Courts of Equity will lay hold of any

(*s*) See Williams (10th ed.) 484, n. (*f*) ; see also as to appropriation, *post*, p. 570.

(*t*) 60 & 61 Vict. c. 65, s. 1.

(*u*) *Re* Somerville & Turner's Contract, [1903] 2 Ch. 583

(*x*) See Williams (10th ed.) 486.

(*y*) Smith's Comp. of Law of Real and Personal Property (5th ed.), s. 605. As to the rights *inter se* of joint owners and joint tenants see Kennedy *v.* De Trafford, [1897] A. C. 180.

controlling circumstance to prevent a survivorship and create a trust. Thus if a joint purchase is made in the name of one of the purchasers and the other pays or secures his share of the purchase-money, he will be entitled to his share of the purchase as a resulting trust. So if two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, his representatives will be entitled to his proportion as a trust ; for the nature of the transaction as a loan of money repels the presumption of an intention to hold the mortgage as a joint tenancy. So if two persons jointly purchase an estate, and pay unequal proportions of the purchase-money, and take the conveyance in their joint names, in case of the death of either, there will be no survivorship, but they will be deemed to have purchased as in the nature of partners, and to have intended to hold the estate in proportion to the sums which each advanced (*z*). So if two or more make a joint purchase of land, and afterwards one of them lays out a considerable sum in repairs and improvements and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it, as being in the nature of a joint undertaking or partnership (*a*).

Parol evidence of surrounding circumstance admissible to show intention.

On a purchase by two persons, contributing the purchase-money in equal shares, parol evidence of surrounding circumstances and of subsequent dealings is admissible, notwithstanding the Statute of Frauds, to prove an intention to hold in severalty, but it would seem that parol evidence of statements of intention is not admissible (*b*).

Principles as to partnership.

There is an exception to the *jus accrescendi* or right of survivorship as incident to joint tenancy in favour of partners ; the maxim of the common law, *jus accrescendi inter mercatores pro beneficio commercii locum non habet*, being applicable. On the death of a partner, although a Court of Law may, in general, view the partnership property only according to the state of the legal title, the legal personal

(*z*) Story's Eq. Jur., § 1206.

(*a*) Lake *v.* Gibson, (1729) 1 Eq. Cas. Abr. 291, s. 3.

(*b*) Harrison *v.* Barton, (1860) 1 J. & H. 287.

representative of the deceased partner has a general lien upon the surplus partnership assets in respect of his interest in the partnership on taking the partnership account. This lien, however, does not interfere with the right of the surviving partner to deal with the separate properties, real and personal, belonging to the partnership for the purpose of realisation, and to give a good title to persons dealing in good faith with him in respect of those properties either as purchasers or mortgagees (*c*). So with respect to choses in action, though the right of the deceased joint tenant devolves on his personal representative, the remedy survives to his companion, who alone must enforce the right by action. And it has been doubted whether the rule *jus accrescendi inter mercatores pro beneficio commercii locum non habet* can in any case be enforced but in a Court of Equity (*d*).

Dissolution of partnership by death.

Except in the case of a limited partnership registered in accordance with the provisions of the Limited Partnerships Act, 1907 (*e*), a partnership is dissolved by the death of a partner, and in the absence of any agreement between the partners the representatives of the deceased partner are entitled to have the partnership business wound up and disposed of, and the rights of the surviving partner or partners and the representatives of the deceased partner will be regulated by the provisions of the Partnership Act, 1890 (*f*).

Authority of surviving partner.

Sect. 38 of the Partnership Act, 1890, provides that "after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

Effect of surviving partner carry-

Sect. 42 (1) provides that "where any member of a firm has died or otherwise ceased to be a partner, and the surviv-

(*c*) *Re* Bourne, [1906] 1 Ch. 113, and (C. A.), [1906] 2 Ch. 427.

(*d*) See Smith's Mercantile Law (3rd ed.) 149; and see *post*, p. 415.

(*e*) 7 Edw. VII c. 24.

(*f*) 53 & 54 Vict. c. 39. The goodwill of the business if saleable must be sold and the proceeds accounted for: Hill *v.* Fearis, [1905] 1 Ch. 466.

ing or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the out-going partner or his estate, then in the absence of any agreement to the contrary, the out-going partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets."

ing on business without any final settlement of accounts.

And by s. 44, in settling accounts after a dissolution, " the assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order :—

Mode of application of assets after dissolution.

1. In paying the debts and liabilities of the firm to persons who are not partners therein ;

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital ;

3. In paying to each partner rateably what is due from the firm to him in respect of capital ;

4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

Although as between the partners themselves one cannot dissociate his share of a particular asset from the rest of the partnership assets, yet as between beneficiaries under the Will of a deceased partner, where the partnership is solvent, the testator is entitled to treat his interest in any particular asset of the partnership as something he could separate from the rest of the partnership assets, and give it in a different direction to his general share in the business, and the beneficiaries are bound to give effect as best they can to the wishes the testator has expressed ; and where, under such circumstances, a testator made a specific devise of his share in partnership freeholds, it was held that, as between the beneficiaries under the Will, the devisee took it free from liability to contribute to the partnership debts (*g*).

(*g*) *Re* Holland, [1907] 2 Ch. 88.

Effect of the Limited Partnership Act, 1907.

A limited partner under the Act of 1907 (*h*) must be described as such in the particulars of registration, and the particulars must state the sum contributed by him and whether paid in cash or how otherwise, and during the continuance of the partnership he is not at liberty to draw out or receive back any part of his contribution, and is not liable for the debts or obligations of the firm beyond the amount so contributed (s. 4 (2)), provided he does not take part in the management of the partnership business (s. 6 (1)). A limited partnership is not dissolved by the death or bankruptcy of a limited partner (s. 6 (2)). In the event of the dissolution of a limited partnership, its affairs shall be wound up by the general partners, unless the Court otherwise orders (s. 6 (3)).

Limited partnerships may also be dissolved and wound up by the Court in the exercise of its ordinary jurisdiction or under the provisions of the Companies (Consolidation) Act, 1908, ss. 267, 268.

A limited partner may, with the consent of the general partners, assign his share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor (s. 6 (5) (6)) ; but an assignment shall be deemed to be of no effect, for the purposes of the Act, until advertised in the " Gazette " (s. 10). A general partner, that is, any partner who is not a limited partner as defined by the Act (s. 3), is liable for all debts and obligations of the firm (s. 4 (2)). Subject to the provisions of the Act, the Partnership Act, 1890, and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the express provisions of the last mentioned Act, apply to limited partnerships (s. 7).

Effect of bare possession of goods by deceased.

The circumstance of the deceased having died in possession of goods will not give his personal representative a title to sue for them, even against a mere wrong doer, if it can be shown that the title is not in the plaintiff (*i*).

(*h*) 7 Edw. VII. c. 24.

(*i*) Elliott *v.* Kemp, (1840) 7 M. & W. 306.

But where after his bankruptcy a bankrupt acquires goods and dies intestate, so long as the trustee in the bankruptcy does not interfere, the title of his administrator is good as against everyone else (*k*).

On construction of Wills question whether executor has legal estate in land or merely power of sale.

As regards deaths happening before the commencement of the Land Transfer Act, 1897, and as regards deaths happening subsequently in respect of land of copyhold tenure or customary freeholds excepted from the expression real estate by s. 1 (4) of the same Act, questions may arise on the construction of Wills whether the legal estate in land is vested in the executors as trustees with or without power of sale, or whether the executors be merely *ex officio* invested with a power of sale.

With reference to such cases the following distinctions may be noticed :—

A devise of land to executors to sell passes the interest in it ; but a devise that executors shall sell the land, or that the land shall be sold by the executors, gives them but a power and no estate passes to them (*l*), although under the power vested in them by the Will they can vest in the purchaser such estate as their testator had (*m*).

When power of sale is to be implied.

Where a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made, if the proceeds are distributable by the executor, he has the power by implication (*n*).

Apart from statute, to enable executors to sell, the power must either be expressly given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office, as in payment of debts and legacies (*o*).

(*k*) Fyson *v.* Chambers, (1842) 9 M. & W. 460 ; and cf. Cohen *v.* Mitchell, (1890) 25 Q. B. D. 262 ; and see Hunt *v.* Fripp, [1898] 1 Ch. 675, and *post*, p. 607.

(*l*) Williams (10th ed.) 490 ; Farwell on Powers (2nd ed.), p. 68.

(*m*) Forbes *v.* Peacock, (1843) 11 M. & W. 630 ; and see per Kekewich, J., in *Re* Barrow-in-Furness Corporation and Rawlinson's Contract, [1903] 1 Ch. 339, 346.

(*n*) Williams (10th ed.) 490.

(*o*) Bentham *v.* Wiltshire, (1819) 4 Madd. 44, 49, per Leach, V.-C.

Effect of charge of real estate with debts or devise to another charged with debts.

A charge of the real estate with debts *simpliciter* does not give the executors an implied power of sale (*p*).

Where the estate is devised to a particular person charged with the payment of debts or legacies, the doctrine of implying a power in the executors does not apply, since the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title (*q*).

Effect of Lord St. Leonards' Act.

With regard to any Will which has come into operation after the 13th August, 1859, Lord St. Leonards' Act (22 & 23 Vict. c. 35, ss. 14, 15, 16 and 18) enables real estate, charged by a testator with the payment of his debts or any legacy, to be sold or mortgaged in the following events : if the property is devised by the testator so charged to trustees for the whole of his estate or interest therein (*r*), then, under ss. 14 and 15, such devisees in trust, or their successors in trust, are the persons to raise the same by sale or mortgage, but if the property so charged is not devised in such terms as that his whole estate and interest therein shall become vested in any trustee, by s. 16 the executor is given the like power of raising the moneys as by ss. 14 and 15 is vested in devisees in trust. But s. 18 places a limit on the provisions of ss. 14, 15 and 16 by providing that they are not to extend to a devise to any person or persons in fee or in tail or for the testator's whole estate and interest charged with debts or legacies.

It has been held that a devise by way of executory or springing use, *e.g.*, a devise to the first son who shall attain twenty-five years of age—is not a devise in fee within the meaning of s. 18, and in such a case the real estate charged by the testator with his debts and legacies can be sold by the executor under s. 16 (*s*).

Act does not apply to an administrator *cum testamento annexo.*

There can be no implied power in an administrator to pay debts, and Lord St. Leonards' Act, s. 16, confines the power

(*p*) Doe *v.* Hughes, (1851) 6 Exch. 223.

(*q*) Colyer *v.* Finch, (1856) 5 H. L. C. 905.

(*r*) See *In re* Adams and Perry's Contract, [1899] 1 Ch. 554.

(*s*) *Re* Barrow-in-Furness Corporation and Rawlinson's Contract, [1903] 1 Ch. 339.

thereby given to executors ; consequently on the renunciation of the executors an administrator with the Will annexed cannot exercise any implied power which the executors would have had under the Will, and has no power to sell real estate by virtue of that Act (*t*).

Direction to pay debts *simpliciter* charges the real estate.

Where a testator by his Will simply directs all his debts to be paid, such a direction amounts to a charge of all his debts on all his estates, unless it is countervailed by something which afterwards appears in the Will (*u*).

Otherwise direction that debts are to be paid by executors.

But where a testator directs that his debts are to be paid by his executors, it is *primâ facie* to be considered that he means the payment to be made by them out of the funds which come to their hands as executors (*x*). That would apply to leasehold property, but not to freehold. But it is a question of intention, to be gathered from the whole Will, whether all the property which the testator gives to his executors shall be subject to the payment of his debts.

Effect of direction to executors to pay debts followed by gift of real estate to them.

Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, or only a life interest, or no beneficial interest at all. But, in all the cases in which that has been held, the entirety of the liability has been thrown on the entirety of the estate (*y*). The rule therefore would not apply where all the real estates are not devised to the executors and the effect would be to subject a part of the real estate to the liability and to exempt other part (*z*), or where there are two or more executors to whom unequal benefits are given by the Will (*a*).

Word "residue" coupled with

But the residuary real estate may be charged by force of

(*t*) *Re* Clay and Tetley, (1880) 16 C. D. 3.

(*u*) Corser *v.* Cartwright, (1875) L. R. 7 H. L. 731, 735, per Ld. Cairns.

(*x*) Wasse *v.* Heslington, (1834) 3 My. & K. 495.

(*y*) *Re* Bailey, (1879) 12 C. D. 268, 273.

(*z*) *Ibid.*

(*a*) Harris *v.* Watkins, (1854) Kay, 438.

direction to pay debts may charge residuary real estate.

the word "residue" coupled with the direction to pay debts, although in the application of the above principle other real estate is not charged (*b*).

Direction to pay debts *simpliciter* creates equitable charge only.

Doe v. *Hughes* (*c*) decided that a direction that debts should be paid only created an equitable charge and did not enable the executors to give the legal estate to a purchaser. But in all cases where there is a devise of the legal estate to the executors they can give the legal estate, and it is immaterial whether or not they take the beneficial interest (*d*).

Mere charge of debts will not enlarge estate devised to trustees.

In Wills made as well before as since 1838 a devise to trustees in trust to pay the testator's debts vests in them the absolute legal fee. But a mere charge of debts on the lands devised, the trustees not being directed to pay the debts, does not enlarge the estate of the trustees (*e*).

Otherwise where debts are directed to be paid by executor-trustees.

Yet where there is a direction that the debts shall be paid by the executors, or simply that the testator's debts shall be paid, followed by a devise of real estate to trustees, who are also named executors, it is to be presumed that it was the intention of the testator that the executors should take such an estate as would enable them to pay the debts out of the property devised to them (*f*), and the machinery of the Statute of Uses will not be applied to make them mere conduit pipes of the legal estate (*g*).

Effect of Land Transfer Act, 1897.

Now, under the Land Transfer Act, 1897 (s. 1 (1)), in cases of death after the 31st December, 1897, real estate (except land of copyhold tenure or customary freehold as mentioned in sub-s. 4) vests in the personal representatives of the deceased, and s. 2 (2) provides that the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or

(*b*) *Re* Bailey, (1879) 2 C. D. 268.
(*c*) (1851) 6 Exch. 223.
(*d*) *Re* Tanqueray-Willaume and Landau, (1882) 20 C. D. 465; *Re* De Burgh Lawson, (1889) 41 C. D. 568.
(*e*) Hawkins on Wills, 151; (2nd ed. 333).
(*f*) Marshall *v.* Gingell, (1882) 21 C. D. 790.
(*g*) *Re* Brooke, [1894] 1 Ch. 43.

one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate. Under this Act the executors who had proved could not convey the legal fee simple without the concurrence of a co-executor who had not proved or renounced and to whom power was reserved to prove (*h*). This is now amended by the Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 12, as respects dispositions made after 31st December, 1911, which enables a sale, transfer, or disposition of real estate to be made by the proving executor or executors alone, and without the authority of the Court.

A good title can be made by general executors to the testator's real estate in England without the concurrence of special executors of foreign assets (*i*).

When presumption arises that all debts are paid.

In the case of *Re Tanqueray-Willaume and Landau* (*k*), the Court of Appeal held, that where executors in whom the legal estate is vested are selling real estates charged with debts, a purchaser is not bound or entitled to enquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease, but intimated that after the lapse of twenty years a presumption arises that the debts have been paid, especially when a beneficiary is found to be in the enjoyment of the estate, and the purchaser, therefore, in such latter case, is put upon inquiry ; and, it would seem there is no distinction in this respect between a devise to executors subject to a charge of debts, and a devise to them upon trust for the payment of debts. This rule or presumption, however, does not apply to executors selling leaseholds or personal estate of their testator. The distinction between real and personal estate in this respect appears to be that in the one case it is the exercise by trustees of a mere power of sale, and in the other it is the exercise by the executor of the right which the law gives him as executor to deal with assets vested in him in that character (*l*). As to persons dying

(*h*) *Re* Pawley and London and Provincial Bank, [1900] 1 Ch. 58.

(*i*) *Re* Cohen's Executors and London County Council, [1902] 1 Ch. 187.

(*k*) (1882) 20 C. D. 465.

(*l*) *Re* Whistler, (1887) 35 C. D. 561.

since the commencement of the Land Transfer Act, 1897, real estate vesting in the personal representatives under the Act will now stand on the same footing as chattels real in respect of the above rule or presumption.

Presumption executor acted as such although expressed to convey as beneficial owner.

The mere circumstance that a conveyance or mortgage by an executor does not purport to be executed by him in that capacity but as beneficial owner, is not sufficient, in the absence of anything in the transaction to show the contrary, to raise the presumption that he was acting otherwise than in the discharge of his duties (*m*).

(*m*) Corser *v.* Cartwright, (1875) L. R. 7 H. L. 731; *Re* Venn and Furze's Contract, [1894] 2 Ch. 101; and see *Re* Verrell's Contract, [1903] 1 Ch. 65, where under peculiar circumstances a purchaser's objection to title was allowed; and see also *Re* Henson, [1908] 2 Ch. 356, and *post*, p. 243.

CHAPTER XIV.

OF THE ESTATE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

Several executors or administrators have joint and entire interest :

it cannot be divided :

it survives without new grant.

If there be several executors or administrators, they are regarded in the light of an individual person. They have a joint and entire interest in the effects of the testator or intestate, including chattels real, which is incapable of being divided ; and in case of death such interest shall vest in the survivor without any new grant by the Court. Consequently if one of two executors or administrators grant or release his interest in the testator's or intestate's estate to the other, nothing shall pass ; because each was possessed of the whole before. So if one of several executors release but his part of the debt, it has been held that the whole is discharged (*a*). And if two executors have a term and one grant all that belongs to him the whole term passes (*b*).

One cannot release to the other.

Release by one is a discharge of the whole debt.

Underlease by one passes the entirety.

So the act of one in possessing himself of the effects is the act of the others, so as to entitle them to a joint interest in possession, and a joint right of action if they are afterwards taken away (*c*).

Possession of one entitles all to joint right of action.

On the same principle of a joint and entire interest it follows that at law one cannot maintain an action in right of deceased against the other, or against a third person jointly with one of themselves, since he cannot sue himself (*d*) ; nor after the death of one of several executors, can his executor be sued by the surviving co-executor for a debt due to their testator (*e*). But if a debtor makes his creditor and another person executors, and the creditor neither proves the Will nor acts as executor, he may maintain an action against the other for his demand on the testator (*f*).

One cannot maintain action at law against the other.

(*a*) Williams (10th ed.) 684.
(*b*) Dyer, 23a.
(*c*) Williams (10th ed.) 685.
(*d*) *Ibid.*
(*e*) Williams (10th ed.) 726.
(*f*) Rawlinson *v.* Shaw, (1790) 3 T. R. 557.

All must join in bringing actions at law.

If there are several executors appointed by the Will they must all join in bringing actions at law (*g*). But where one executor of several has alone proved the Will, he may sue without making the other executors parties, although they have not renounced (*h*).

The rule as to bringing actions at law does not apply to proceedings in equity by executors, but in an action for administration every executor who has proved must be a party to the record either as plaintiff or defendant (*i*).

Effect of Ord. 16, r. 11.

Ord. 16, r. 11, provides that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court has no power under Ord. 16, r. 11, to order a person to be added as plaintiff without his consent in writing. In *Drage* v. *Hartopp* (*k*), where one of two executors having absconded, the other executor sued a mortgagor for personal payment, and in default of payment an account and sale, the Court refused on the interlocutory application of the defendant to add the absconding executor as defendant, as being unnecessary at that stage of the proceedings, it being immaterial for any purpose that he should be before the Court.

(*g*) Williams (10th ed.) 725.

(*h*) Williams (10th ed.) 726; and see Davies *v.* Williams, 1 Sim. 5, 8, and Doe *v.* Wheeler, (1846) 15 M. & W. 623.

(*i*) Latch *v.* Latch, (1875) 10 Ch. 464.

(*k*) (1885) 28 C. D. 414.

CHAPTER XV.

OF THE ESTATE OF AN EXECUTOR OF AN EXECUTOR AND OF AN ADMINISTRATOR *DE BONIS NON.*

Transmission of interest to executor of an executor.

An executor of an executor, in however remote a series, has the same interest in the effects of the first testator as the first and immediate executor (*a*).

Transmission of interest to an administrator *de bonis non.*

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, etc., which remain in specie, and were not administered by the first executor or administrator. Also if an executor receives money in right of his testator, and lays it up by itself, and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects as goods in specie (*b*).

Whatever property of the original testator or intestate is left unadministered on the death intestate of a sole executor, or on the death of the first administrator, as the case may be, vests in the administrator *de bonis non* of the original testator or intestate, and if such executor or first administrator had improperly retained assets as his own property, or in collusion with a vendee assigned over leasehold property for his own benefit, the same will be treated as assets unadministered and pass to the administrator *de bonis non*, who will be entitled to recover possession, or to have the sale set aside and a conveyance of the legal estate (*c*).

What property does not vest in administrator *de bonis non.*

If, however, the property in any of the effects of the deceased has been changed by the original executor or administrator, and has vested in him in his individual capacity, such effects will go to his own administrator or

(*a*) See Williams (10th ed.) 687, and *ante*, p. 58.

(*b*) Williams (10th ed.) 687.

(*c*) Cubbidge *v.* Boatwright, (1826) 1 Russ. 549.

executor, and not to the administrator *de bonis non* (*d*). For instance, if an administrator makes an underlease of the intestate's term, reserving rent to himself, his executors, administrators and assigns, and then dies, his executor or administrator and not the administrator *de bonis non* of the intestate shall have the rent (*e*).

So where A. was indebted to B. for rent, and B. died intestate, and C. his administrator having taken a promissory note for the rent also died, it was held that the note belonged to the administrator of C. and not to the administrator *de bonis non* of B. (*f*). So if the original executor or administrator, in his own name, and not in his representative capacity, recovers judgment and dies, his own executor or administrator must take execution of the judgment (*g*). But where the cause of action is such that the first administrator may sue in his representative capacity the right of action devolves upon the administrator *de bonis non ;* for instance in the case of a bill of exchange endorsed generally and delivered to the first administrator it may be sued upon by the administrator *de bonis non* (*h*). In like manner the administrator *de bonis non* may stand in such privity of estate that he will be compelled to carry out an agreement entered into by the first administrator (*i*).

(*d*) Williams (10th ed.) 689.

(*e*) Drue *v.* Baylye, (1675) 1 Freem. 392 ; Kelly *v.* Shaw, (1850) 1 Ir. C. L. Rep. 225.

(*f*) Barker *v.* Talcot, (1687) 1 Vern. 473.

(*g*) Williams (10th ed.) 691.

(*h*) Catherwood *v.* Chabaud, (1823) 1 B. & C. 150, and see Moseley *v.* Rendell, (1871) L. R. 6 Q. B. 338.

(*i*) Hirst *v.* Smith, (1797) 7 T. R. 182, per Kenyon, C.J. ; and see *Re* Watson, (1884) 53 L. J. Ch. 305, as to the lien of a solicitor of a deceased executor or administrator upon documents, as against the administrator *de bonis non*, arising from such privity of estate.

CHAPTER XVI.

OF THE POWER OF AN EXECUTOR OR ADMINISTRATOR.

Power of administrator equal to that of executor

Same property in personal effects and same power to bring actions to recover them as deceased had.

Right to enter on land to remove goods of deceased.

After the administration is granted the power of an administrator is equal to and with the power of an executor. As an executor or administrator has the same property in the personal effects as the deceased had when living, so he has the same power to bring actions to recover them (*a*).

Prior to the Land Transfer Act, 1897, within a convenient time after the testator's death or the grant of administration, the executor or administrator had a right to enter the house descended to the heir, in order to remove the goods of the deceased, provided he did so without violence, as if the door were open, or at least the key were in the door; and although the door of entrance into the hall and parlour were open, he could not, therefore, justify forcing the door of any chamber, to take the goods contained in it, but was empowered to take those only which were in such rooms as were unlocked or in the door of which he should find the key. He had, also, a right to take deeds and other writings relative to the personal estate out of a chest in the house if it were unlocked, or the key were in it, but he had no right to break open even a chest. If he could not take possession of the effects without force, he had to desist and resort to his action. On the other hand, if the executor or administrator, on his part, were remiss in removing the goods within a reasonable time, the heir might distrain them as damage feasant (*b*). Now by s. 1 of the Land Transfer Act, 1897, the real estate (except copyholds and certain customary freeholds) of a testator dying after the commencement of the Act

(*a*) Williams (10th ed.) 694; and see *post*, pp. 297 *et seq.*

(*b*) Williams (10th ed.) 695.

vests in the legal personal representative. But the position of a legal personal representative of a tenant for life or in tail being unaffected by the Act he will be allowed a convenient time for the removal of the testator's or intestate's effects (*c*).

Power of disposition over personal effects.

It is a general rule of law and equity that an executor or administrator has an absolute power of disposal over the whole personal effects of his testator or intestate ; and that they cannot be followed by creditors, much less by legatees, either general or specific, into the hands of the alienee. The principle is, that the executor or administrator, in many instances, must sell, in order to perform his duty in paying debts and legacies ; and no one would deal with an executor or administrator if liable afterwards to be called to account (*d*).

Powers of disposition over real estate.

The Land Transfer Act, 1897 (s. 2 (2)), as amended by s. 12 of the Conveyancing Act, 1911, now gives to the personal representatives like power over the real estate vested in them under the Act as if that real estate were a chattel real vested in them.

Rule *delegatus non potest delegare* does not apply.

Both at law and in equity the executor or administrator is the absolute owner of the assets of the testator or intestate ; he does not stand in the position of a *delegatus*, and nothing can intercept that ownership, except fraud or collusion as between him and the parties with whom he deals. He is at liberty either to sell or to pledge the assets (*e*) ; and the pledgee has the right to sell the property pledged if not redeemed within the proper time (*f*) ; and so also the executor or administrator may give to another a power of attorney or authority to do any act to render a mortgage effectual, such as a power of sale or a power to collect assets (*g*). The rule *delegatus non potest delegare* has no application to such a case, since the position of an executor

(*c*) Stodden *v.* Harvey, (1610) Cro. Jac. 204.

(*d*) Williams (10th ed.) 700 ; Whale *v.* Booth, (1785) 4 T. R. 625.

(*e*) Earl Vane *v.* Rigden, (1870) L. R. 5 Ch. 663, see per Ld. Hatherley.

(*f*) Russell *v.* Plaice, (1854) 18 Beav. 21, 28.

(*g*) *Ibid.* ; Earl Vane *v.* Rigden, *ubi sup.*

or administrator, in relation to assets of the testator or intestate, differs from that of a trustee, or a donee of a bare authority or of a particular power (*h*).

Executor or administrator to be presumed to be acting as such.

Although the legal personal representative is not justified in mortgaging to raise money for his own purposes (*i*), or for purposes which it was not his duty to perform as administrator (*k*), yet where a person who fills the position of an executor or administrator is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as such, unless there is something in the transaction which shows the contrary ; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by the executor in that capacity (*l*). But if a person who is in fact an executor, but not purporting to deal as executor, contracts with a purchaser who did not know he was an executor, the latter cannot for the purpose of supporting the contract rely on the fact that he was executor (*m*). Moreover, executors by assenting may be divested of property theirs *virtute officii*, and if thereby it devolves on them as trustees, they are precluded making title as executors (*n*).

Purchaser or mortgagee without the legal estate takes subject to prior equities.

Where the purchaser or mortgagee does not acquire the legal estate, as between two equities, the equity of the estate of the testator or intestate and the equity of the person dealing with the executor or administrator without notice of any impropriety, the latter must take subject to the prior equities ; that is, he is postponed to the *cestuis que trust* (*o*).

But to defeat legal transfer notice of devastavit must be shown.

But to defeat a legal transfer notice of the devastavit or collusion between the purchaser or mortgagee and the legal personal representative must be shown to have existed. For fraud will vitiate any transaction, and notice of an intended

(*h*) See Combe's Case, (1613) 9 Rep. 75 b, and Farwell on Powers (2nd ed.), p. 446.

(*i*) *Re* Morgan, (1881) 18 C. D. 93.

(*k*) Ricketts *v.* Lewis, (1882) 20 C. D. 745.

(*l*) *Re* Venn and Furze's Contract, [1894] 2 Ch. 101, 114.

(*m*) Solomon *v.* Attenborough, [1912] 1 Ch. 451 ; [1913] A. C. 76.

(*n*) S. C., [1913] A. C. 76.

(*o*) *Re* Morgan, *ubi sup.*

misappropriation necessarily involves the purchaser or mortgagee in the breach of duty (*p*).

When sale or mortgage by executor residuary legatee for his own private purposes will be valid.

Although where a man, known to be executor, borrows on the security of his testator's assets admittedly for his own private purposes, the transaction is invalid (*q*), yet if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator (*r*).

Also in case of executor being specific legatee.

The same principle applies to a sale or mortgage by an executor of a specific legacy of which he is specific legatee (*s*).

Similar to position of legatee whose legacy has been assented to.

The case of an executor who is a residuary legatee or specific legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor, and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee, or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration, and this immunity on the part of the purchasers is not limited to cases of legal assets, or to cases where the purchasers have obtained the legal estate or its equivalent (*t*).

Executor or administrator cannot purchase assets for himself either immediately or by means of a trustee.

An executor shall not be permitted, either immediately or by means of a trustee, to be purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*u*).

(*p*) See judgment of Ld. Eldon in M'Leod *v.* Drummond, (1810) 17 Ves. 152; Hall *v.* Andrews, (1872) 27 L. T. 195.

(*q*) Wilson *v.* Moore, (1834) 1 My. & K. 337, 356.

(*r*) Graham *v.* Drummond, [1896] 1 Ch. 968, 974.

(*s*) Hall *v.* Andrews, *ubi sup.*; and see Coote on Mortgages (7th ed.) 416.

(*t*) Graham *v.* Drummond, *ubi sup.* at p. 976.

(*u*) Hall *v.* Hallett, (1784) 1 Cox 134

The principle is that a trustee for sale owes a duty to his *cestuis que trust* to do everything in his power for their benefit, and is therefore absolutely precluded from buying the trust property, irrespective of questions of undervalue or otherwise, because he may be thus induced to neglect his duty (*x*).

Mere power of becoming trustee by proving Will is insufficient to invalidate transaction if he never acted.

A sale, however, is not to be avoided merely because when entered upon the purchaser has the power to become trustee of the property purchased, as for instance by proving the Will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shown that he in fact used his power in such a way as to render it inequitable that the sale should be upheld (*y*).

Where a surviving partner, being sole executor of the deceased partner, is entitled under the deed of partnership to acquire the deceased partner's share of the assets, the deed of partnership constitutes a binding contract for sale and purchase, and the contract will not be avoided by error in the method of valuation, but such error will be corrected by the Court so as to enable the purchase to be complied with (*z*).

Executor or administrator may underlease.

In dealing with the leaseholds of a testator or intestate, an executor or administrator may grant an underlease, if necessary for the due administration of the property. But that is an exceptional mode of dealing with the assets, and those who accept a title in that way must take it subject to the question whether it was the best way of administering the assets (*a*).

May lease real estate.

Subject to a similar question it would seem that an executor or administrator may now under the authority of the Land Transfer Act, 1897, lease the testator's or intestate's real estate for the purposes of administration (*b*).

(*x*) Per Buckley, J., in *Re* Boles and British Land Co.'s Contract, [1902] 1 Ch. 244, 246; and see Nugent *v.* Nugent, [1908] 1 Ch. 546.

(*y*) Clark *v.* Clark, (1884) 9 App. Cas. 733.

(*z*) Hordern *v.* Hordern, [1910] A. C. 465.

(*a*) Oceanic Steam Navigation Co. *v* Sutherberry, (1880) 16 C. D. 236.

(*b*) See *Re* North, [1909] 1 Ch. 625, with regard to a brickfield.

Cannot give option to purchase.

An executor or administrator, however, cannot give an option to purchase, being in this respect in the position of a trustee who cannot enter into a contract for sale to bind the estate for some years afterwards (*c*).

Effect of condition or proviso for forfeiture on alienation or sub-letting without licence.

The legal personal representative of a deceased lessee may dispose of the lease notwithstanding it contains a condition or proviso for forfeiture if the lessee should assign or let without licence ; the alienation by death is not a forfeiture, nor is the executor or administrator bound if he is not named in the proviso or covenant (*d*), but if the executor or administrator is named, he is bound (*e*).

May endorse promissory note or bill of exchange payable to deceased or his order.

A promissory note or bill of exchange made payable to the deceased or his order, may be indorsed by his executor or administrator (*f*).

Bills of Exchange Act, 1882, as affecting executors and administrators.

It may be convenient here to refer to those sections of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), affecting particularly executors and administrators.

May avoid personal liability.

Sect. 26 (1). " Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon ; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

Sect. 31 (5). " Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability."

Presentment.

Sect. 41 (1) (c). " Where the drawee is dead presentment may be made to his personal representative."

Sect. 41 (2) (a) provides that presentment in accordance with the rules contained in s. 41 is excused and a bill may be treated as dishonoured by non-acceptance where the drawee is dead.

(*c*) Oceanic Steam Navigation Co. *v.* Sutherberry, (1880) 16 C. D. 236.

(*d*) Seers *v.* Hind, (1791) 1 Ves. 294.

(*e*) Roe *v.* Harrison, (1788) 2 T. R. 425 ; and see Doe *v.* Bevan, (1815) 3 M. & S. 357 ; Williams (10th ed.) 708.

(*f*) Williams (10th ed.) 711 ; Watkins *v.* Maule, (1820) 2 J. & W. 237.

Sect. 45 (7). "Where the drawee or acceptor of a bill is dead and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found."

Notice of dishonour.

Sect. 49 (9). "Where the drawee or indorser is dead and the party giving notice of dishonour knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found."

Authority of banker determined by notice of death.

Sect. 75 (2). "The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by notice of the customer's death."

Requisites having regard to foreign law.

It may also be useful to refer to s. 72, which provides (*inter alia*) (1), "The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement or acceptance *suprà protest*, is determined by the law of the place where such contract was made.

"Provided that—

"(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

"(b) Where a bill, issued out of the United Kingdom, conforms as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

(2) "Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà protest* of a bill, is determined by the law of the place where such contract is made."

As to when executor or administrator may claim by election.

As to when the personal representative may claim by election, where the testator or intestate at the time of his death was entitled out of several chattels to take his choice of

one or more to his own use, the following principles would seem to apply (*g*).

If the thing, of which the election is given, is to be done *unicâ vice*, the election ought to be at the time.

If nothing passed or vested in the grantee before his election it ought to be made in the life of the parties, as if a man gives to A. such of his horses as A. and B. shall choose, the election ought to be in the life of A. But where an interest vests immediately by the grant—as if a man gives one of his horses to A. and B., after the death of A. B. may choose which he will take, for an interest vested in them immediately by the gift—election may be made by the personal representative as well as by the party himself. If the election determines only the manner or degree in which the grantee shall have the thing, his personal representative as well as the party himself may make it ; for in such case the interest vests immediately. As if a lease be granted to A. for ten or twenty years, as he shall elect, the personal representative is entitled to the election.

So if the thing, of which election is given, is annual, and to have continuance, the personal representative may make the election.

As to allowing time for payment, compromising, compounding, abandoning, and submitting to arbitration, or settling debts or claims

An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient. He may also, if and as he thinks fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith (*h*).

(*g*) See Williams (10th ed.) 713. (*h*) Trustee Act, 1893, s. 21.

Although an executor cannot discharge himself by accounting to his co-executor (*i*), yet it has been held that it is competent for an executor in a proper case to compromise a claim by his co-executor against the estate (*k*).

Survivorship of office.

If one of several executors or administrators dies the powers of the office pass to the survivors (*l*).

As to powers annexed to the office.

It is necessary to determine from the language of the Will whether a power is given to the executors as individuals or whether it is annexed to their office. If it is annexed to their office it can be exercised by the proving executors, to the exclusion of a renouncing executor, or by the surviving executors : that is, by the executors for the time being (*m*). Sect. 22 of the Trustee Act, 1893 (which replaced s. 38 of the Conveyancing and Law of Property Act, 1881), provides that where a power or trust constituted after or created by instruments coming into operation after the 31st December, 1881, is given to or vested in two or more trustees (which expression by s. 50 includes the duties incident to the office of personal representative of a deceased person) jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being (*n*). In *Re Smith* (*o*), Farwell, J., stated his opinion on the result of the authorities on this section of the Act, as follows : " Every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being ; whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is

(*i*) Hill *v.* Curtis, (1865) L. R. 1 Eq. 90, 98.

(*k*) *Re* Houghton, [1904] 1 Ch. 622 ; but see De Cordova *v.* De Cordova, (1879) 4 App. Cas. 692, 703.

(*l*) Williams (10th ed.) 720.

(*m*) Crawford *v.* Forshaw, [1891] 2 Ch. 261.

(*n*) See also *ante*, p. 4.

(*o*) [1904] 1 Ch. 139, 144 ; and see *Re* De Sommery, [1912] 2 Ch. 622.

not enough to exclude the *primâ facie* presumption, and little regard is now paid to such minute differences as those between 'my trustees,' 'my trustees A. and B.,' and 'A. and B. my trustees': the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language."

Payment out of Court after 10 years from death.

Notwithstanding the power of an executor or administrator to receive and give an effectual release and discharge for money due to the estate of the deceased, after any lapse of time from the death, yet, according to the existing practice of the Chancery Division, as a general rule, funds in Court belonging to the estate of a deceased person will not, after the expiration of ten years from his death, be paid to his legal personal representative without notice to beneficiaries (*p*). Moreover, under the Supreme Court Funds Rules, 1905 (rr. 62, 65), funds in Court directed to be paid to a person named in an order who subsequently dies cannot under those rules be paid to his legal personal representative unless probate or letters of administration purport to have been granted within six years from the date of the order.

(*p*) Practice note, [1904] W. N. p. 135.

CHAPTER XVII.

OF THE POWER OF ONE OF SEVERAL EXECUTORS OR ADMINISTRATORS.

Co-executors have joint and entire authority: acts of any one deemed to be acts of all.

Co-EXECUTORS, however numerous, are regarded in law as an individual person; and, by consequence, the acts of any one of them, in respect of the administration of the effects, are deemed to be the acts of all; for they have all a joint and entire authority over the whole property (*a*). Hence the receipt of one is a valid discharge (*b*), so also one of several executors may release or pay a debt or transfer any part of testator's property, without the concurrence of the other executor (*c*), and may settle an account with a person accountable to the estate (*d*).

When Court may refuse its assistance to equitable assignee of one executor

As a general rule the Court will enforce an equitable security on part of the assets of a testator created by one of several executors in favour of a mortgagee for value in good faith (*e*), but on the other hand there are cases in which the Court has refused its assistance to persons seeking to enforce in equity rights claimed by virtue of what has been done by a single executor contrary to the wishes of the co-executor (*f*).

One of several joint personal representatives could not prior to 1912 sell or transfer real estate without authority of Court.

Although under s. 2 of the Land Transfer Act, 1897, the powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to real estate so far as the same are applicable, yet sub-s. (2) of s. 2 provides that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the

(*a*) Williams (10th ed.) 715.

(*b*) Charlton *v.* Earl of Durham, (1869) L. R. 4 Ch. 433.

(*c*) Jacomb *v.* Harwood, (1751) 2 Ves. Sen. 266; Cole *v.* Miles, (1852) 10 Hare, 179.

(*d*) Smith *v.* Everett, (1859) 27 Beav. 446.

(*e*) McLeod *v.* Drummond, (1810) 17 Ves. 152.

(*f*) Lepard *v.* Vernon, (1813) 2 V. & B. 51; Sneesby *v.* Thorne, (1855) 7 D. M. & G. 399; and see per Stirling, J., in *Re* Ingham, [1893] 1 Ch. 352, 360.

Court, to sell or transfer real estate. But as respects dispositions made after 31st December, 1911, sub-s. (2) has been amended by the Conveyancing Act, 1911, s. 12 (*g*).

Acknowledgment of debt by one of several executors.

An acknowledgment of a debt within Lord Tenterden's Act (9 Geo. IV. c. 14) made by one of several executors as executor binds the testator's estate (*h*). But it may be questioned whether an acknowledgment by one only of several joint personal representatives will bind the testator's real estate (*i*).

One of several ought not to pay statute-barred debt against wish of co-executor.

Although an executor is not bound to plead the Statute of Limitations, and may pay a statute-barred debt, yet the leaning of the Courts is against allowing him to pay such debt against the wishes of his co-executor (*k*).

Assent of one of several to legacy.

An assent to a legacy by one of several executors is sufficient (*l*).

When all executors required to join in transfer of stock.

By virtue of certain Acts of Parliament all the executors may be required to join in the transfer of stock in the books of the Bank of England (*m*), or railway shares or stock (*n*). The transfer of the share or other interest of a deceased member of a company under the Companies (Consolidation) Act, 1908, is regulated by s. 29 of that Act, and it would seem that one of two executors who are noted as executors but not registered as shareholders may validly effect a transfer (*o*). Notice acquired by a company by production of probate is limited to a notice of the names and addresses of the persons who had constituted themselves the executors of the testator (*p*).

Act of one executor cannot create new liability on the other personally.

Although the act of one of two executors in possessing himself of the testator's effects is the act of the other, so as to entitle him to a joint interest in possession, and a joint right of action, if the effects are afterwards taken away, yet it

(*g*) See *ante*, p. 235.
(*h*) See *post*, p. 446.
(*i*) See *post*, p. 452.
(*k*) Midgley *v.* Midgley, [1893] 3 Ch. 282; and see Astbury *v.* Astbury, [1898] 2 Ch. 111, 113.
(*l*) See *post*, p. 541.
(*m*) See 33 & 34 Vict. c. 71, s. 23.
(*n*) See the Companies Clauses Act, 1845 (8 Vict. c. 16), ss. 14, 18, 20, and Barton *v.* L. & N. W. Railway Co., (1889) 24 Q. B. D. 77.
(*o*) See Buckley on the Companies Acts.
(*p*) Grundy *v.* Briggs, [1910] 1 Ch. 444.

cannot create a new liability, and impose a charge on the other personally, and in his own individual character, which, without such act, would never have existed (*q*).

One executor not agent of the other to bind him by his several contracts.

Moreover, though one of several executors may dispose of the assets so as to bind the assets, it is not to be inferred that one of several executors is the agent of the others so as to bind them by his several contracts (*r*).

Powers of one of several administrators.

One of several administrators is on the same footing as regards his powers and liabilities as one of several executors (*s*).

(*q*) Williams (10th ed.) 718; and see *post*, p. 656, with regard to a devastavit by one of several executors.

(*r*) Williams (10th ed.) 719; Turner *v.* Hardey, (1842) 9 M. & W. 770.

(*s*) Jacomb *v.* Harwood, (1751) 2 Ves. Sen. 266; Smith *v.* Everett, (1859) 27 B. 446; and see *post*, p. 656.

CHAPTER XVIII.

OF THE DEVOLUTION OF ASSETS AS REAL OR PERSONAL ESTATE.

SECT. 1.—*Of Chattels Personal of the Deceased.*

THE subject of chattels personal or things moveable, in considering whether they belong to the executor or administrator as part of the personal estate of the deceased or as annexed to the inheritance, is usually treated in three divisions (*a*), viz. : (1) chattels animate ; (2) chattels vegetable ; (3) chattels inanimate.

(1) *Chattels Animate.*

Chattels animate may be subdivided into such as are *feræ naturæ* and domestic animals. In domestic animals a man may have absolute property, and they are therefore capable of being transmitted, like any other personal chattel. In animals *feræ naturæ*, *i.e.*, such as are usually found at liberty and wandering at large, generally speaking, a man can have no property transmissible to his representatives. But a qualified property may subsist in animals of the latter class, *per industriam hominis*, by a man reclaiming them and making them tame by art, industry or education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty ; and the animals so reclaimed or confined belong to the executor or administrator as personal property. Thus, if the deceased have any tame pigeons, deer, rabbits, pheasants or partridges, they shall go to his executors or administrators as personal property. So though they were not tame yet if they were kept alive, in any room, cage, or such like place ; as fish in a trunk. But if at any time they regain their natural liberty,

Property in domestic animals

Property in animals *feræ naturæ*.

(*a*) Williams (10th ed.) 531.

the property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning (*b*).

A qualified property may also subsist in animals *feræ naturæ propter impotentiam*, as in young pigeons, which, though not tame, being in the dovehouse, are not able to fly out; and they shall go to the executors or administrators as personal property (*c*).

Property in animals owned *ratione privilegii*.

The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator as personal property. Thus deer in a park (*i.e.*, as it should seem, in a park properly so called, which must be either by grant or prescription), conies in a warren, doves in a dovehouse, will not go to the executor or administrator as personal property. So if a man buys fish and puts them into his pond, and dies, they will go with the inheritance, because they are at liberty, but otherwise if they are in a trunk or in a net, or the like; for then they are severed from the soil (*d*).

Rights of lessee thereto.

The personal representative of a lessee for years of lands can have no further interest in deer, conies, doves and fish than the deceased had, *i.e.*, a right to take to his own use as many as he pleases, during his term, provided he leaves enough for the stores; for if a lessee for years kill so many that there is not sufficient left for the stores, it is waste (*e*).

(2) *Chattels Vegetable.*

What are chattels vegetable.

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree when severed from the body of it, or the old plant or tree itself when severed from the ground. Hence apples, pears, and other fruits, if hanging on the trees at the time of the death of the ancestor, shall go to the heir and do not pass as personal property (*f*).

(*b*) Williams (10th ed.) 531.
(*c*) *Ibid.*, 532.
(*d*) *Ibid.*
(*e*) *Ibid.*, 533.
(*f*) *Ibid.*, 534.

Trees if severed are personalty.

What amounts to severance is question of fact.

So if trees are attached to and form part of the soil they are realty—*quicquid plantatur solo solo cedit*—if they are severed from the soil they are personalty. The degree and extent to which a tree may form part of the soil by reason of the attachment of its roots, is in every case a question of fact. A tree may be absolutely dead and yet form part of the soil, so the question of the life of the tree seems immaterial (*g*).

Trees sold by tenant in fee simple, or reserved on sale of the fee simple, are personal property.

But where the tenant in fee simple sells the trees they pass to the purchaser as personal property, and so also where the tenant in fee simple sells the land reserving the trees, in consideration of law they are divided as chattels from the freehold, and will pass as personal property to the personal representatives of the vendor (*h*).

Trees sold by tenant in tail must be severed before death.

Apart from powers conferred by settlement or by the Settled Land Acts, if a tenant in tail sells the trees and dies before actual severance as to the issue in tail they are part of the inheritance, and shall go with it, and the purchaser, or his personal representative, cannot take them (*i*).

Distinction between trees which are timber and such as are not.

With respect to the property in trees and bushes when severed, there seems to be a material difference between such trees as, by the general law of the land, or by the custom of the country where they grow, are timber, and such as are not. For if tenant in dower, or by the curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber trees, or a stranger does so, or the wind blows them down, the trees so severed shall not go to the tenant or to his personal representative but to the owner of the first estate of inheritance in the land. On the other hand, if such a tenant cuts down hedges or trees, not timber, or they are severed by the act of God, the tenant shall have them ; and, consequently, his personal representative. So if trees are blown down, which are in their nature timber, but are dotards without any timber in them, or if such are wrongfully severed

(*g*) *Re* Ainslie, (1886) 30 C. D. 485.
(*h*) Williams (10th ed.) 534.
(*i*) *Ibid.*, 535.

by the lessor, they belong to the tenant, and will pass to his personal representative (*k*).

What is timber :

The law is stated as follows by Sir G. Jessel, M.R., in *Honywood* v. *Honywood* (*l*) : "The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England ; and secondly, on the special custom of a locality. By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text writer, to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even whitethorn and blackthorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary ; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact of what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favour of the owners of timber estates, that is, estates which are cultivated merely for the produce of saleable timber, and where the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same

Periodical cutting on timber estates.

(*k*) Williams (10th ed.) 535. (*l*) (1874) L. R. 18 Eq. 306, 309.

kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life. With that exception, I take it, a tenant for life cannot cut timber."

Trees not timber: right of tenant for life to cut.

"The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy 'germins,' as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down he commits waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down."

What is waste.

"If the timber is timber properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate of inheritance. There is in equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded with the tenant for life, to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this: that where timber is decaying, or for any special reason it is proper to cut it down, and the

tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the Court to have it cut down, there the Court disposes of the proceeds on equitable principles, and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance who can take away the money."

Qualification as to timber estates.

This judgment of Sir G. Jessel was considered by the Court of Appeal in *Dashwood* v. *Magniac* (*m*), and with reference to what Sir G. Jessel said about timber estates, Lindley, L.J., remarked, "If his observations are confined to estates the trees on which, though timber, may by virtue of a local usage be cut periodically when grown in woods with a view to ensure a succession of timber and to preserve such woods, I see no reason to dissent from him; but if he intended to go further, he may have gone too far." And Kay, L.J., remarked that there is no exception from the common law as to waste in favour of the limited owner of what is called a "timber estate" (*n*).

Emblements, meaning of.

There are, however, certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the occupier's death, yet, as between the executor or administrator of the person seised of the inheritance, and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels and will pass as such. These are usually called emblements (*o*).

Object to compensate for labour and expense.

When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature, and dies before harvest time, the

(*m*) [1891] 3 Ch. 306; and see *Re* Trevor-Batyés Settlement, [1912] 2 Ch. 339, as to the title of tenant for life to profits from periodical cuttings.

(*n*) See now Settled Land Act, 1882, ss. 29, 35.

(*o*) Williams (10th ed.) 536.

law gives to his executors or administrators the profits of the crop, *emblavence de bled*, or emblements, to compensate for the labour and expense of tilling, manuring and sowing the land (*p*).

To what the doctrine of emblements extends.

The doctrine of emblements extends not only to corn and grain of all kinds, but to every thing of an artificial and annual profit, that is, produced by labour and manurance (*q*).

To what it does not extend :

fruit ;

plantations ;

But the rule as to emblements does not apply to fruit growing on trees, nor to the plantation of trees, unless they be trees, shrubs, and other produce of the ground planted by gardeners and nurserymen by trade with an express view to sale (*r*).

growing crop of grass,

except artificial grasses.

The growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements ; because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation. It seems, however, that the artificial grasses, such as clover, saint foin and the like, by reason of the greater care and labour necessary for their production, are within the rule of emblements (*s*).

Extends only to species of crop which repays labour within the year.

But the doctrine of emblements extends to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period (*t*).

As to hops.

The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule (*u*).

Personal representative entitled as against heir but not as against dowress :

entitled as against heir in tail ;

Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir : though not as against a dowress. So if the deceased was seised in fee tail, his personal representatives are entitled to the privilege as against the heir in tail. But where a man is seised of the soil as joint tenant, and dies,

(*p*) Williams (10th ed.) 537.
(*q*) *Ibid.*
(*r*) *Ibid.*, 538.
(*s*) *Ibid.*
(*t*) Graves *v.* Weld, (1833) 5 B. & Ad. 105, 118.
(*u*) *Ibid.*, at p. 119.

not against surviving joint tenant; unless deceased sowed by agreement;

the corn, &c., sown goes to the survivor, and the moiety shall not go to the personal representatives of the deceased; yet if a joint tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his personal representatives shall have the emblements (*x*).

nor against devisee;

Crops growing on the land go to the devisee of the land unless expressly given by Will to some one else; a general bequest of personal estate is insufficient to deprive the devisee (*y*), but a gift of "farming stock" is sufficient to pass the growing crops to the specific legatee as against the devisee of the land (*z*).

devisee for life entitled against the heir although he die before severance;

So, if the testator, being seised in fee, sows the land, and devises it to A. for life (without any remainders over), and the testator and A. both die before severance, the executors of A. shall have the crop though A. did not sow (*a*).

but not against remaindermen.

It is otherwise if the testator has limited remainders over after the death of the life tenant. Thus if A., seised of land, sows it, and then conveys it or devises it to B. for life, remainder to C. for life, and B. dies before the corn is reaped, in this case B.'s executors shall not have the emblements, but they shall go with the land to C. (*b*).

Rule extends to everyone possessed of an uncertain estate dying before severance.

The privilege of taking the emblements is not confined to the case of the representatives of a person seised of the inheritance, as against the heir; but the rule is general, that every one who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his personal representatives. Therefore, the personal representatives of a tenant for life are entitled to emblements to the exclusion of the remainderman or reversioner (*c*). So the personal representatives of a man, seised in right of his wife, who sows and dies before severance, are entitled to emblements (*d*). And if tenant for years, *si tamdiu vixerit*, sows

(*x*) Williams (10th ed.) 539.
(*y*) Cooper *v.* Woolfitt, (1857) 2 H. & N. 122.
(*z*) *Re* Roose, (1880) 17 C. D. 696.
(*a*) Williams (10th ed.) 540.
(*b*) *Ibid.*, 542.
(*c*) *Ibid.*, 541.
(*d*) *Ibid.*, 543.

and dies before severance his personal representatives are entitled (*e*).

Effect of 14 & 15 Vict. c. 25, s. 1, on determination of lease by death of landlord.

Sect. 1 of 14 & 15 Vict. c. 25, provides that, where the lease of "any farm or lands" shall determine by the death or cesser of the estate of any landlord entitled for his life or for any uncertain interest, instead of claims to emblements, the tenant shall continue to hold such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease, as if it had expired by effluxion of time or otherwise; and the succeeding landlord shall be entitled to recover and receive of the tenant a fair proportion of the rent, for the period since the lessor's death or cesser of estate.

This Act applies to any tenancy in respect of which there may be a claim to emblements, for instance a cottage with about an acre of land partly cultivated as a garden and partly sown with corn and planted with potatoes (*f*).

Rule does not apply where tenancy determines by man's own act.

The general rule of law is, that the tenant shall not have emblements when the tenancy is determined by his own act; as where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeiture, condition broken, &c. (*g*). The act on which the lease is forfeited for condition broken need not be the sole and distinct act of the tenant alone; it is sufficient if it is the consequence of his act, as for instance forfeiture on judgment and execution or on bankruptcy in consequence of a previous debt of the tenant (*h*).

Right of egress and regress.

Where there is a right to emblements, the law gives a free entry, egress and regress, as much as is necessary, in order to cut and carry them away (*i*). But in justifying for entering or continuing in possession the claimant must show that the crop was ripe or fit for harvesting or that it needed care or cultivation (*k*).

(*e*) Williams (10th ed.) 542.

(*f*) Haines *v.* Welch, (1868) L. R. 4 C. P. 91.

(*g*) Williams (10th ed.) 543, n. (*y*); and cf. Leschallas *v.* Woolf, [1908] 1 Ch. 641.

(*h*) Davis *v.* Eyton, (1830) 7 Bing. 154.

(*i*) Williams (10th ed.) 544; Kingsbury *v.* Collins, (1827) 4 Bing. 202.

(*k*) Hayling *v.* Okey, (1853) 8 Exch. 531, 545.

Compensation under Agricultural Holdings Act, 1908.

Besides emblements a tenant (that is a holder of land under a landlord for a term of years, or for lives, or for lives and years, or from year to year) on quitting his holding at the determination of a tenancy is entitled under the Agricultural Holdings Act, 1908 (*l*), to obtain from his landlord compensation for improvements made on his holding in accordance with the provisions of the Act, and the right to receive such compensation enures for the benefit of his personal representatives (s. 48). So also the personal representatives of a landlord, tenant for life, who have been compelled under the Act to pay compensation for improvements to an outgoing tenant, who had claimed compensation and whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid (*m*).

(3) *Chattels Personal Inanimate.*

Heirlooms.

The meaning of the term "heirlooms" is stated as follows by Chitty, L.J., in *Hill* v. *Hill* (*n*). "The meaning of the word standing alone, without any explanatory context, in reference to chattels in gross (I am not speaking of fixtures) is the same in law and in equity. Its primary meaning is chattels which on the death of the ancestor pass to the heir. These are of two classes. The first is where they pass by special custom, such as the best bed and the like. The second is where the chattels, to use the old phrase, savour of the inheritance; that is, are directly connected with it. This class includes title-deeds and the chest or box where they are usually kept, the patent creating a dignity, the garter and collar of a knight, an ancient horn where the tenure is by cornage as in the case of the Pusey horn, and the ancient jewels of the Crown.

Primary meaning.

"As the special custom has to be proved strictly, little or nothing is heard at the present day of the first class. For

(*l*) 8 Edw. VII. c. 28.
(*m*) Gough *v.* Gough, [1891] 2 Q. B. 665.
(*n*) [1897] 1 Q. B. 483, 494.

this statement of the law it is unnecessary to cite authorities. I refer, however, to Co. Litt. 18 b, and 1 Williams on Executors (9th ed.), p. 633 *et seq.*, in which latter work the subject is fully treated. But there is a secondary sense in which the term ' heirlooms ' is used ; that is, where chattels are settled by deed or Will or otherwise, vesting them in trustees upon trusts declared whereby they are limited to go along with corporeal or incorporeal hereditaments, so far as the rules of law or equity will permit. This secondary sense is, speaking generally, the sense in which the term ' heirlooms ' is employed popularly, and also by lawyers as a brief description. As an instance of the latter, I refer to the 37th section of the Settled Land Act, 1882, where the marginal note (which forms no part of the enactment) is ' heirlooms.' The word itself does not occur in the text, which speaks of personal chattels settled on trust so as to devolve with land. But the chattels thus settled are both at law and in equity still chattels ; and, as neither law nor equity knows of such a thing as an estate in a chattel or a remainder in the proper sense of those artificial terms, it follows that the chattels so settled, retaining their character of chattels, are, like any other personal property, subject to the general rule against perpetuities. Accordingly, in compliance with this rule, the property in the chattels must vest absolutely within lives in being and twenty-one years afterwards. Consequently, in well-drawn settlements, regard being had to another rule of law that words which create an estate tail in realty confer the absolute property in personalty, a provision is usually inserted that the chattels shall not vest in an unborn person who takes an estate tail in the realty by purchase unless he attains the age of twenty-one years (*o*). All these propositions are well established : I am led into

Secondary meaning.

Settled chattels subject to rule against perpetuities :

cannot be entailed ;

(*o*) The vesting of the chattels may be further restricted to a tenant in tail being entitled in possession to the mansion-house ; *Re* Lord Chesham's Settlement, [1909] 2 Ch. 329 ; and see *Re* Petre's Settlement Trusts, [1910] 1 Ch. 290 (as to meaning of "the actual possession under the limitations," etc.) ; also *Re* Parker, [1910] 1 Ch. 581 (where there was no reference to the use and enjoyment of the chattels with the mansion-house).

cannot be imparted with descendible quality like freehold.

stating them by the argument for the defendant. There is another proposition of law, that a man cannot change the general law, and impart to a chattel a descendible quality, except in some such manner as already stated. He cannot turn a chattel into freehold land. Accordingly, if A. gives a chattel to B. and merely says that B. is to have it as an heirloom, no force (in the absence of any context or special circumstance) can be attributed to the word 'heirloom.' Such was the opinion of Lord Hatherley in *Shelley* v. *Shelley* (*p*) and such was the decision in *In re Johnston*" (*q*).

Power of disposition.

Heirlooms cannot be devised away from the house to which they belong, but during his life the owner may sell or dispose of them, as he may of the timber of the estate (*r*).

Ornaments of bishop's chapel.

It has been held that the ornaments of the chapel of a preceding bishop belong to the succeeding bishop, although other chattels in the case of a sole corporation belong to the executors of the deceased (*s*).

Fixtures in parsonage house.

If an incumbent enter upon a parsonage house in which are hangings, grates, iron backs to chimneys and such like, not put up there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but they shall continue in the nature of heirlooms ; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture, or household goods, and shall go to his executor (*t*).

What are fixtures.

Fixtures.—The meaning of the word fixture is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according

(*p*) (1868) L. R. 6 Eq. 540.
(*q*) (1884) 26 C. D. 538.
(*r*) Williams (10th ed.) 546.
(*s*) Corven *v.* Pym, (1604) 12 Rep. 105.
(*t*) Williams (10th ed.) 551.

to the maxim "*Quicquid plantatur solo solo cedit*" (*u*). There is no exception to this rule. There is, however, a different and a separate rule that whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which is called waste. The two rules stand consistently together, not one by way of exception to the other, but to this second rule, namely, the irremoveability of things fixed to the inheritance, an exception has been established in favour of fixtures which have been attached to the inheritance for the purpose of trade. Fixtures of this kind cannot be removed by the executor of one who was complete owner of the inheritance, but they can be removed by the executor of a tenant, or by the tenant himself as against the landlord during the course of the tenancy (*x*).

Irremoveability of fixtures by limited owner.

Exception in case of trade fixtures.

There is a similar exception in favour of tenant's fixtures annexed for domestic convenience or ornament.

Trade and tenant's fixtures are "things which are annexed to land for the purposes of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration" (*y*). A lessor has no right to distrain on chattels which by their physical construction have been made part of the soil, but which are severable by the tenant during the continuation of the tenancy (*z*).

Exception in case of fixtures for domestic convenience or ornament.

It was stated by Blackburn, J., in *Holland* v. *Hodgson* (*a*), that "since the decision of *Climie* v. *Wood* (*b*) it must be considered as settled law (except, perhaps, in the House of Lords)

Trade fixtures pass by conveyance of the land by the owner of them.

(*u*) Bain *v.* Brand, (1876) 1 App. Cas. 762, 772, per Ld. Chelmsford.

(*x*) *Ibid.*, see per Ld. Cairns, at pp. 767, 768.

(*y*) Holland *v.* Hodgson, (1872) L. R. 7 C. P. 328, per Blackburn, J., at p. 333; and see *Re* Glasdir Copper Works, Ltd., [1904] 1 Ch. 819; Leschallas *v.* Woolf, [1908] 1 Ch. 641, 652.

(*z*) See Provincial Bill Posting Co. *v.* Low Moor Iron Co., [1909] 2 K. B. 344, relating to advertisement hoardings; and see *post*, p. 269 (*g*).

(*a*) (1872) L. R. 7 C. P. 328.

(*b*) (1869) L. R. 4 Exch. 328.

that what are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land he has a right, as against the freeholder, to sever the fixtures from the land, yet if he be a mortgagor in fee he has no such right as against his mortgagee." In *Ellis* v. *Glover & Hobson, Ltd.* (*c*), however, it was held that a mortgagor in possession has the right to permit trade fixtures to be put up, and may have, by implication of the absence of stipulation to the contrary, the right to remove them from the mortgaged premises, provided they are removed before the mortgagee takes possession, but this right of removal ceases when possession is taken by the mortgagee.

Effect of bargain between the affixers: Hire-purchase agreements.

The case of *Hobson* v. *Gorringe* (*d*) raised the question whether a mortgagee of land in fee, when he enters upon the mortgaged premises, can take possession of an engine which is attached to the soil thereof by means of bolts and screws, although the engine did not and never had belonged to the mortgagor, but to a third party under a hiring and purchase agreement with the mortgagor. It was held that although a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession, yet a *de facto* fixture does not become not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers.

It makes no difference that the mortgagor was a lessee for ninety-nine years and not owner in fee. So held in *Reynolds* v. *Ashby & Son, Ltd.* (*e*), a case in other respects similar to and following *Hobson* v. *Gorringe* and in which Collins, M.R., remarked that the facts with regard to the hire purchase agreement did not appear to be any evidence to rebut the presumption arising from such an annexation to the freehold. The case of *Reynolds* v. *Ashby & Son, Ltd.*, was affirmed by

(*c*) [1908] 1 K. B. 388.
(*d*) [1897] 1 Ch. 182, 188.
(*e*) [1903] 1 K. B. 87.

the House of Lords (*f*), and Lord Lindley said: "The purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the buildings as a factory. . . . The question is whether they passed by the mortgage. But for the fact that Holdway had not paid for them the question would not in my opinion be open to the slightest doubt. There is a long series of decisions of the highest authority showing conclusively that as between a mortgagor and a mortgagee machines, fixed as these were to land mortgaged, pass to the mortgagee as part of the land. . . . I do not profess to be able to reconcile all the cases on fixtures, still less all that has been said about them. In dealing with them attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute. In this case, and still regarding the question for the present as concerning the mortgagor on the one side and the mortgagee on the other, it is in my opinion impossible to hold that the machines did not pass with the mortgage" (*g*).

But as between the equitable interest of the hirer of machinery under a hire-purchase agreement and the interest created by an equitable mortgage the ordinary principles of priorities apply (*h*).

What constitutes annexation.

There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz., the degree of annexation and the object of the annexation. Perhaps the true rule is, that articles not other-

(*f*) [1904] A. C. 466.

(*g*) See also Crossley Brothers, Ltd. *v.* Lee, [1908] 1 K. B. 86, where it was held that an engine let out under a hire-purchase agreement being a fixture, was therefore not distrainable for rent; and see *ante*, p. 267.

(*h*) *Re* Samuel Allen & Sons, Ltd., [1907] 1 Ch. 575; *Re* Morrison, Jones & Taylor, Ltd., [1913] W. N. 128.

wise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels ; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel (*i*).

In *Leigh* v. *Taylor* (*k*), where valuable tapestries had been affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them as chattels, Lord Halsbury, L.C., in his speech makes the following observations : " One principle, I think, has been established from the earliest period of the law down to the present time, namely, that if something has been made part of the house it must necessarily go to the heir, because the house goes to the heir and it is part of the house. That seems logical enough. Another principle appears to be equally clear, namely, that where it is something which, although it may be attached in some form or other (I will say a word in a moment about the degree of attachment) to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, then it is removable and goes to the executor. . . . It is all very well to say that there is a difference between the cases of an heir and an executor on the one hand, and a landlord and tenant on the other ; but if you grant the proposition that it must depend upon the purpose of the annexation, and you must attend to the degree of the annexation, I am wholly unable to frame a hypothesis of a state of things in which these two

(*i*) Per Blackburn, J., in Holland *v.* Hodgson, (1872) L. R. 7 C. P. 328, at pp. 334, 335.

(*k*) [1902] A. C. 157.

principles will not decide the question, whether you are dealing with a landlord and tenant, or whether you are dealing with a tenant for life and a remainderman, or with people standing in any other relation to these things. . . . My own view is that, going back for some centuries, the real differences of opinion which apparently on the surface have been entertained by different judges, have not been at bottom differences in the law at all, but the facts have been regarded in different aspects according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not according to the nature of the structure which was being dealt with. The principle appears to me to be the same to-day as it was in the early times, and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir." And Lord Macnaghten observed (*l*): "The question is still as it always was, Has the thing in controversy become parcel of the freehold ? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times."

But in *Reynolds* v. *Ashby & Son, Ltd.* (*m*), Collins, M.R., remarked that when the decision of *In re De Falbe*, affirmed in *Leigh* v. *Taylor*, comes to be looked at it appears to decide, not that the tapestries there in question remained mere movable chattels, but that they were fixtures in the sense of things which, though attached to the freehold, were removable as between a tenant for life and a remainderman. It is, however, submitted that this is not the correct view of the decision of the House of Lords in *Leigh* v. *Taylor*, and that

(*l*) At p. 162. (*m*) [1903] 1 K. B. 87, 100.

the latter case laid down the principle for ascertaining when a chattel, though attached, is not to be treated as forming part of the realty, that is not a fixture at all but a mere movable chattel. The case of *Reynolds* v. *Ashby & Son, Ltd.* was a case relating to trade fixtures, whereas *Leigh* v. *Taylor* was not a case relating to trade or tenant's fixtures, but chattels affixed for ornament by a limited owner.

In *Re Sir Edward Hulse, Bart.* (*n*), the question arose whether certain machinery affixed to a steam-mill and which the tenant for life had purchased from the lessee of the mill on the expiration of the tenancy belonged to the executrix of the tenant for life or the remainderman, and Buckley, J., in deciding in favour of the executrix observes in his judgment: "The old maxim '*Quicquid plantatur solo solo cedit*' was as between tenant and landlord long since relaxed for the benefit of trade. It was advantageous that the tenant should be at liberty, for the purposes of his trade, to affix chattels to the soil, and in his case there was established an exception by which he was entitled to remove the fixtures during the term. As between tenant for life and remainderman the same principle is applicable. It is advantageous that the tenant for life should be in such a position as to be able to improve the estate for his own enjoyment without being thereby compelled to make a present to the remainderman. . . . In *Leigh* v. *Taylor* (*o*) (being the title of *Ward* v. *Taylor* (*p*) on appeal to the House of Lords) the question being, as I have said, between tenant for life and remainderman, the learned Lords treated the question as one to be determined, not so much by an investigation of the physical means used for the attachment, as for the purpose for which and of the intention of the person by whom the chattels were attached. The question is, not what is the nature of the attachment of the chattel to the soil, but what, having regard to all the facts of the case, must have been the intention of the tenant for life. It is upon these principles, I think, that

(*n*) [1905] 1 Ch. 406, 410.
(*o*) [1902] A. C. 157.
(*p*) [1901] 1 Ch. 523, 530.

this case has to be decided. The question has been argued whether the true principle is that where the tenant fixes chattels to the freehold with the right to remove them during his term, that right is an exception which enables him to remove part of the freehold, or an exception by which the chattels do not become part of the freehold. It appears to me that the exception is an exception to the maxim '*Quicquid plantatur solo solo cedit.*' It is not that the law allows the tenant for years to remove part of the freehold, but that the chattels have not become part of the freehold. The exception makes them no part of the freehold."

In the case of trade and tenant's fixtures it is difficult to reconcile the latter part of this statement with the exception to the second rule laid down by Lord Cairns in *Bain* v. *Brand* (*q*) and the judgment of Blackburn, J., in *Holland* v. *Hodgson* (*r*).

An executor of a deceased owner in fee has no right to remove from the inheritance more than that which really and properly considered is never fixed to it in a definite way (*s*).

The principle, stated shortly, to be gathered from the cases is, it is submitted, that in deciding whether a chattel affixed is or is not a fixture depends on the circumstances and intention, but that trade fixtures, and tenant's fixtures, annexed for the purposes of domestic convenience or ornament, may be removed in any case, except as against a mortgagee.

Agricultural Holdings Acts.

Attention should here be drawn to the Act 14 & 15 Vict. c. 25, s. 3, giving the landlord the right to purchase tenant's buildings and fixtures erected on farms and enabling the tenant to remove them unless the landlord elects to purchase; also to the Agricultural Holdings Act, 1908 (8 Edw. VII. c. 28), s. 21, whereby under certain circumstances provided by the Act the landlord has a right to purchase any engine,

(*q*) *Ante*, p. 266.

(*r*) *Ante*, p. 267.

(*s*) *Re* Whaley, [1908] 1 Ch. 615 (picture and tapestry forming part of a general scheme of decoration of a room); *Re* Ld. Chesterfield's Settled Estates, [1911] 1 Ch. 237 (ornamental wood carvings by Grinling Gibbons).

machinery, fencing or other fixture and buildings, which otherwise would remain the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

Sect. 2.—*Of the distinction between Freeholds and Chattels Real of the Deceased.*

Estate of freehold defined.

An estate of freehold may be defined to be an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or for some uncertain interest, created by Will, or by some mode of conveyance capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person (*t*).

Thus not only a term for one's own life, or for the life of another, is deemed a freehold, but if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays £10, &c., or until the grantee be promoted to a benefice, or till A. makes B. baily of his manor, or for any like uncertain time, in all these cases the grantee has an estate of freehold (*u*).

Leasehold interest defined.

On the other hand, all interests for a shorter period than a life, or more properly speaking, for a definite space of time, measured by years, months, or days, are deemed chattel interests or personal property (*v*).

An estate limited to A. and his assigns during the life of B. is a freehold interest, but an estate limited to A. and his assigns for a term of years if B. shall so long live is a leasehold interest (*x*).

A chattel real cannot be made transmissible to heirs.

An interest which in its nature is a chattel real cannot be rendered transmissible to heirs (*y*). For instance, if a lease

(*t*) Watkins' Principles of Conveyancing (9th ed.), p. 65, note by Morley and Coote.

(*u*) Williams (10th ed.) 512.

(*v*) 1 Preston on Estates, 203.

(*x*) Williams (10th ed.) 512.

(*y*) Preston on Abstracts of Title, (1823) vol. 1, p. 447.

for years is given to A. and his heirs, or to A. and the heirs of his body and for default of such issue to B., in either case A. takes the property absolutely and it is transmissible as personal estate (*z*).

Personal property cannot be entailed.

A bequest of personal property to a man for life, and afterwards to the heirs of his body is an absolute bequest to the first taker ; for whatever disposition would amount to an estate tail in land, gives the whole interest in personal estate, which is incapable of being entailed (*a*). This rule, however, must be applied with great care and with due regard to the context (*b*). If there appears any other circumstance or clause in the Will to show the intention that the words " heirs " or " heirs of the body " should be words of purchase, and not words of limitation, then the ancestor will take for life only, and his heir will take by purchase (*c*).

SECT. 3.—*Of Annuities which do or do not descend to the Heir.*

Annuity derived out of freehold interest.

Annuity derived out of chattel interest.

An annuity which is derived out of, and depends on, a freehold interest, will on intestacy be transmissible and belong to heirs. But every annuity granted out of a chattel interest will be a chattel interest although it be limited to the grantee and his heirs for a life or lives (*d*).

Personal annuity limited to heirs.

Yet a personal annuity, not concerning land, if granted with words of inheritance, will descend to the heir ; but it passes as personal estate if words of inheritance are not used in the grant (*e*).

Annuity cannot be entailed.

An annuity, however, cannot be entailed, consequently where it is limited to a man and the heirs of his body, he takes a fee simple conditional, which becomes absolute on the birth of issue (*f*).

(*z*) Williams (10th ed.) 514.

(*a*) Elton *v.* Eason, (1812) 19 Ves. 73, 78.

(*b*) See Smith *v.* Butcher, (1878) 10 C. D. 113 ; *Re* Bishop and Richardson's Contract, [1899] 1 I. R. 71 ; Hawkins on Wills, p. 188.

(*c*) Williams (10th ed.) 515, 866, n. (*n*) ; and see *post*, p. 470.

(*d*) Preston on Abstracts of Title, (1823) vol. 1, p. 446 ; *Re* Fraser, [1904] 1 Ch. 111, 726.

(*e*) Lord Stafford *v.* Buckley, (1750) 2 Ves. Sen. 170, 178 ; Williams (10th ed.) 622.

(*f*) Turner *v.* Turner, (1783) 1 Bro. C. C. 325 ; *Re* Sir J. Rivett-Carnac's Will, (1885) 30 C. D. 136, 141.

Personal annuities in fee unaffected by Land Transfer Act, 1897.

Personal annuities in fee, being personal estate, are not affected by s. 1 (1) of the Land Transfer Act, 1897.

SECT. 4.—*Estates pur autre vie.*

Effect of Wills Act, 1837.

With respect to estates *pur autre vie* of any deceased person, who shall not have died before the 1st January, 1838, the Wills Act, 1837 (1 Vict. c. 26), after repealing the sections of the statutes of 29 Car. II. c. 3, and 14 Geo. II. c. 20, dealing with such estates, and enacting, by s. 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, proceeds to enact, by s. 6, that "if no disposition by Will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

Last conveyance and not original grant determines whether estate goes to special occupant or to personal representative.

The terms of the last conveyance of an estate *pur autre vie* and not the original grant must be looked to in order to ascertain whether it is to go to the heir as special occupant or to the legal personal representative (*g*). So where an equitable estate *pur autre vie* limited to a testator, his heirs and assigns, was devised by him, as his freehold hereditaments, to trustees, their heirs and assigns, for the use of A., it was held that, on A.'s intestacy, though the entire estate passed to A., there was nothing on the face of the Will to entitle his heir to

(*g*) Earl of Mountcashell *v.* More-Smyth, [1896] A. C. 158, 165.

claim as special occupant, and that the estate passed to his administrator under s. 6 of the Wills Act (*h*).

SECT. 5.—*The Right of next Presentation to a Church.*

Right of presentation personal estate of deceased patron :

If the church becomes vacant and the owner of the advowson dies before presenting, the right of presentation belongs to the personal representative of the deceased patron as personal property and does not go to the heir (*i*).

so if patron was prebendary :

It is the same where the person is seised of the advowson in a politic capacity, as prebendary. But in the case of a bishop dying during a vacancy the King presents by reason of his custody of the temporalities (*k*).

but on death of bishop King presents.

Death of grantee before avoidance.

If the patron, whether a natural or a politic person, grant the next presentation and the grantee dies before avoidance it goes to his personal representative as personal property, for it is a chattel real till a vacancy happens, and afterwards the vacancy turns it into a chattel personal (*l*).

Death of incumbent owner in fee of advowson.

If the incumbent be also seised in fee of the advowson and dies intestate, his heir and not his personal representative shall present (*m*).

Death of patron of donative benefice.

Formerly if a person seised of the advowson of a donative benefice died during a vacancy, the right of donation descended to the heir, differing from a presentative benefice in this respect (*n*), but s. 12 of the Benefices Act, 1898 (61 & 62 Vict. c. 48), now provides that every benefice with cure of souls which at the commencement of this Act was donative shall as from that date be presentative.

During vacancy of parsonage.

So if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage and not the executor of the deceased person shall present (*o*).

Election of Ordinary where clerk presented by testator and not admitted.

If the testator presents and, his clerk not being admitted before his death, his executors present their clerk, the Ordinary is at his election which clerk he will receive (*p*).

(*h*) *Re* Inman, [1903] 1 Ch. 241 ; see also *Re* Sheppard, [1897] 2 Ch. 67.
(*i*) Williams (10th ed.) 509
(*k*) *Ibid.*, 510.
(*l*) *Ibid.*, 509, 510.
(*m*) *Ibid.*, 510.
(*n*) Williams (10th ed.) 511.
(*o*) *Ibid.*
(*p*) *Ibid.*

Sect. 6.—*Of Shares in Public Companies.*

Generally, shares in companies are personal estate.

Shares in the navigation of the River Avon, in the Bath Navigation, and in the New River, were held to be real property, being an inheritance arising out of land (*q*), but it is now usual when Acts of Parliament are obtained for making navigable canals and similar works to provide that the shares shall be deemed to be personal estate.

With regard to shares in companies, whether corporate or unincorporate, a shareholder as such has no right of interference with the property, he has no right to enter upon the lands of the company or claim any portion of the real estate for his private purposes, he has no higher interest in the real estate of the company than that of an ordinary partner seeking his share of the profits out of whatever property those profits might be found to have resulted, and on his death this right passes to his personal representative as personal estate (*r*).

Express provision in Companies Acts.

The Companies Act, 1862, and the Companies (Consolidation) Act, 1908, expressly provide that shares in any company under those Acts shall be personal estate.

Sect. 7.—*Of Estates held as Security.*

Estate by statute merchant, statute staple or *elegit* is a chattel interest.

Estates by statute merchant, statute staple and by *elegit*, the possessors of which are said to hold their lands as freehold, are securities for the payment of debts, and will go to the personal representative as a chattel interest (*s*).

Freehold land held in mortgage.

Formerly heir trustee for personal representative.

Formerly, although the legal estate in freehold land held in mortgage descended to the heir, yet in equity the money due upon the mortgage was to be paid to the legal personal representative of the mortgagee, and the heir of the mortgagee was a trustee of the land for the legal personal representative (*t*).

Now mortgage estates devolve on personal representative:

Now, in cases of death after the 31st December, 1881, s. 30 of the Conveyancing and Law of Property Act, 1881

(*q*) See Williams (10th ed.), 624.
(*r*) Myers *v.* Perigal, (1852) 2 De G. M. & G. 599; Ashworth *v.* Munn, (1880) 15 C. D. 363, 375.
(*s*) Williams (10th ed.) 513.
(*t*) *Ibid.*, 518.

(44 & 45 Vict. c. 41), provides that estates vested by way of mortgage in any person solely shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives, or representative from time to time, in like manner as if the same were a chattel real vesting in them or him. But s. 88 of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), excludes the application of s. 30 of the Conveyancing and Law of Property Act, 1881, to land of copyhold or customary tenure vested in the tenants on the court rolls.

except land of copyhold or customary tenure.

As between the heir-at-law and the next-of-kin of a deceased person, *primâ facie* they are respectively bound by the condition of the property at the time of the deceased's death.

Quality of estate fixed at death.

So where a mortgage deed contains a power of sale with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate (*u*). The same principle applies even when at the time of sale the mortgagor was a lunatic and so continued until his death. Moreover, it is immaterial whether the mortgage deed provides that the surplus proceeds of sale should be paid to the mortgagor, "his executors or administrators," or to the mortgagor, "his heirs or assigns" (*x*).

On sale by mortgagee before equity of redemption has descended surplus proceeds are personal estate.

Secus, if sale is after death of mortgagor.

So where a mortgagee dies entitled to a mortgage interest, that is personal estate at that time; and though afterwards the mortgagor may be barred, that would not convert the property as between the representatives at the time of his death from personal to real (*y*). Consequently the widow of the mortgagee, under such circumstances, would not be entitled to dower out of the mortgaged property (*z*).

Foreclosure or statutory bar of mortgagor after mortgagee's death does not affect rights of representatives of mortgagee.

(*u*) Wright *v.* Rose, (1825) 2 Sim. & St. 323; Bourne *v.* Bourne, (1842) 2 Hare, 35.

(*x*) *Re* Grange, [1907] 1 Ch. 313; [1907] 2 Ch. 20.

(*y*) Att.-Gen. *v.* Vigor, (1803) 8 Ves. 256, 277.

(*z*) Flack *v.* Longmate, (1845) 8 Beav. 420, 424.

Again where a mortgagee of freeholds enters into possession of the mortgaged land, and dies, leaving all his property to his widow for life, but otherwise intestate, and the possession is continued by the widow until the equity of redemption is barred by the Real Property Limitation Act, 1874, the mortgaged land passes as personalty to his next-of-kin (*a*).

But from time rights of mortgagor are barred interest of next-of-kin is realty.

But as from the time when the rights of the mortgagor become barred the right of the next-of-kin of the mortgagee is to the land. Without any election what was previously personalty becomes realty by the operation of the Act. It makes no difference that the parties interested are two, and therefore on the death of one of two next-of-kin after the mortgagor had become barred the one-half share of the land in which he had become beneficially interested as realty was held to descend to his heir-at-law (*b*).

Mortgaged property vested in trustees.

By the Conveyancing Act, 1911, s. 9 (1), property vested in trustees by way of security, becoming, by virtue of the Statutes of Limitation, an order for foreclosure or otherwise, discharged from the right of redemption is to be held on trust for sale, with power to postpone such sale; and (2) the net proceeds are to be applied in like manner as the mortgage debt, if received, would have been applicable, and the income in like manner as the interest.

Sect. 8.—*Of Merger.*

Definition of merger.

Merger is an act of law by which on the union of two estates in one and the same person, without any intermediate estate, the less is extinguished in the greater (*c*).

Instances of merger: chattel interests; estates for life; estates tail and determinable fees.

For instance, a term of years will merge in the immediate reversion, whether it be a chattel interest or an estate of freehold (*d*), and so also an estate for life will merge in a greater estate immediately expectant upon it (*e*). But an estate tail will not become merged in the immediate reversion in fee simple, since such merger would defeat the object of

(*a*) *Re* Loveridge, [1902] 2 Ch. 859.
(*b*) *Re* Loveridge, [1904] 1 Ch. 518.
(*c*) See Preston's Conveyancing (3rd ed.), vol. 3.
(*d*) Burton's Comp. (6th ed.), p. 361.
(*e*) *Ibid.*, p. 300.

the statute *De Donis*, which was to render estates tail inalienable (*f*). Determinable fees, or estates tail after possibility of issue extinct, might merge at common law (*g*), but now by s. 39 of the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), a base fee when united with the immediate reversion is enlarged instead of being merged.

Destruction of rent by merger of reversion.

Formerly if the reversion, where rent was incident, became merged in a superior reversion, as in the case of an underlease on the superior lease becoming merged in the fee, the rent as well as the reversion was destroyed, but now, by 8 & 9 Vict. c. 106, s. 9, on surrender or merger of a reversion expectant on a lease the next estate is to be deemed the reversion.

Destruction of contingent remainders by merger of the particular estate.

Prior to the Act 7 & 8 Vict. c. 76, s. 8, the destruction of contingent remainders might have been effected by the merger of the particular estate, but by that Act they will be converted if in a Will, into executory devises, and, if in a deed, into executory limitations, in the nature and having the properties of executory devises (*h*). Further by the Act 40 & 41 Vict. c. 33, a contingent remainder created after the Act may have effect as a springing or shifting use or executory devise or other executory limitation, if it would have been valid had it been so originally created. But apart from statute a contingent remainder is liable to failure if the contingency does not happen before the determination of the particular estate. The general rule is that when limitations can take effect as remainders they are not to be treated as executory devises, and the application of this rule may be of great importance, as for instance where the limitations as executory devises would be void for remoteness (*i*). The question whether a devise is to be construed as a contingent remainder or an executory devise is one of strict law and cannot be affected by the intention of the testator unless his words can be construed as expressing an intention to make alternative gifts, one as a contingent

(*f*) 1 Cr. Tit. II. ch. 1, s. 51.

(*g*) Preston's Conveyancing (3rd ed.), vol. 3, p. 240.

(*h*) See Watkins' Conveyancing (9th ed.), p. 197.

(*i*) *Re* Wrightson, [1904] 2 Ch. 95.

remainder, and the other by way of executory devise (*k*). Equitable contingent remainders were not subject to be defeated by reason of the absence of a sufficient freehold to support them, and they do not become so liable by subsequently becoming clothed with the legal estate (*l*).

As a general rule the destruction of the particular estate is to accelerate the estates in remainder, but where there is still a possibility of some person becoming entitled under an intermediate limitation the disclaimer of the particular estate will not accelerate the remainders over (*m*).

Merger of equitable in legal estate: attendant and satisfied terms.

Where equitable and legal estates, equal and co-extensive, unite in the same person, the former merges in the latter (*n*). And where a term would merge by its union with the inheritance in the same person, if he has in the one the legal and in the other the equitable estate, the term will attend the inheritance (*o*), and since the Act 8 & 9 Vict. c. 112, where a satisfied term attends the inheritance it is thereby made to cease, except so far as it may afford protection against incumbrances, or other claims, for instance dower (*p*). The Act does not apply to a mortgage term created by the sub-demise of leaseholds (*q*).

Equity does not follow the law on questions of merger.

Upon the subject of merger a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged (*r*). The principle by which the Court of Equity is guided is the intention; and in the absence of express intention, either in the instrument or by parol, the Court looks to the benefit of the person in whom the two estates become vested (*s*). This

Court of Equity guided by intention.

(*k*) White *v.* Summers, [1908] 2 Ch. 256.

(*l*) *Re* Freme, [1891] 3 Ch. 167.

(*m*) *Re* Scott, [1911] 2 Ch. 374.

(*n*) Selby *v.* Alston, (1797) 3 Ves. 339.

(*o*) Capel *v.* Girdler, (1804) 9 Ves. 509.

(*p*) Anderson *v.* Pignet, (1872) L. R. 8 Ch. 180.

(*q*) *Re* Moore & Hulm's Contract, [1912] 2 Ch. 105.

(*r*) Forbes *v.* Moffat, (1811) 18 Ves. 384, 390.

(*s*) Lewin on Trusts (10th ed.), p. 589; and see per Farwell, J., in Ingle *v.* Vaughan-Jenkins, [1900] 2 Ch. 368, 370; Manks *v.* Whiteley, [1912] 1 Ch. 735.

principle applies equally to the merger of estates in land as to merger of charges on land, and if the circumstances are such that a Court of Equity would have held that there was no merger in equity, there is now no merger at law (*t*).

Instances: tenant for life acquiring beneficial lease;

For instance, if a tenant for life in remainder takes a beneficial lease, or an agreement therefor, and subsequently becomes tenant for life in possession, the presumption is against merger in equity (*u*).

owner of estate paying charges.

Again when the owner of an estate pays charges on the estate, which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot (*x*).

Where the owner of the equity of redemption takes a transfer of the mortgage, or where on a conveyance on sale a mortgage is transferred separately, and in either case there is a declaration that the mortgage is to be deemed to be a subsisting charge as a protection to the owner of the equity of redemption against subsequent incumbrances, the mortgage will pass on the death of the owner intestate as personal estate to his next of kin; and it makes no difference that the form of the declaration is for the benefit of the owner "his heirs and assigns." But where it would be a fraud on an incumbrancer of the equity of redemption to keep the prior mortgage alive, no intention to keep the same alive will avail, and it will merge for all purposes (*y*).

Where it is for the benefit of the freeholder that his beneficial interest in a charge should merge there is nothing to prevent its extinguishment; as for instance, where an

(*t*) Capital and Counties Bank, Ltd. *v.* Rhodes, [1903] 1 Ch. 631, 652.

(*u*) Ingle *v.* Vaughan-Jenkins, [1900] 2 Ch. 368.

(*x*) Thorne *v.* Cann, [1895] A. C. 11, 18, per Ld. Macnaghten.

(*y*) *Re* Gibbon, [1909] 1 Ch. 367.

owner of freehold land, who was liable under covenant for the security of the land for portions charged thereon, became entitled to an unraised portion as next-of-kin to an intestate portioner and died without taking out administration to the portioner's estate, since it would have been for the landowner's benefit to merge the charge, thereby reducing the liability on the covenant, it was held that the landowner's beneficial interest in the charge subject to the liabilities (if any) of the portioner's estate, had merged in the land (*z*).

The two estates must be vested in the same person, at the same time, and in the same right.

But in equity, in order that there may be a merger the two estates which are supposed to coalesce must be vested in the same person at the same time and in the same right; for instance, where a father had a life interest in trust funds under his marriage settlement and became entitled as administrator and next-of-kin of a deceased son to a reversionary interest in the same trust funds, it was held that, inasmuch as the father's life interest and the sons' reversion were held by the father in different rights, there was no merger, and that so long as the father's life interest subsisted the fund ought to remain in the hands of the trustees of the settlement, but that on the father executing a surrender of his life interest he was entitled to have the fund transferred to him (*a*).

Judicature Act, 1873, s. 25 (4).

The Judicature Act, 1873, s. 25 (4) provides that "There shall not, after the commencement of this Act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

Sect. 9.—*Of the Doctrine of Equitable Conversion.*

Legal devolution cannot be altered by mere direction by Will.

A testator cannot by a mere direction in his Will that for the purposes of transmission his real estate shall be impressed with the quality of personalty from the time of his death, or *vice versâ*, alter the legal devolution of property (*b*).

(*z*) *Re* French-Brewster's Settlements, [1904] 1 Ch. 713.

(*a*) *Re* Radcliffe, [1892] 1 Ch. 227.

(*b*) Hyett *v.* Mekin, (1884) 25 C. D. 735, 738; *Re* Walker, [1908] 2 Ch. 705.

Equity considers as done what ought to have been done.

It is however an established doctrine in Courts of Equity that things shall be considered as actually done which ought to have been done. On this principle money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted ; and this in whatever manner the direction is given ; whether by Will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed (*c*).

Money directed for purchase of land or land directed to be sold to be considered as so converted.

But by s. 10 of the Conveyancing Act, 1911, where a settlement of property as personal estate, made after 1911, contains a power to invest money in the purchase of land, unless otherwise provided, such land is to be held on trust for sale with power to postpone sale, and the net rents are to be applied in like manner as the income of investments in personal estate.

Person claiming the property must take it in the character the instrument has impressed upon it.

Every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it ; and its devolution and disposition will be governed by the rules applicable to that species of property (*d*). Hence, where freehold property is, by the doctrine of equitable conversion, to be considered as personalty, on an intestacy it becomes distributable among next-of-kin, and a Will disposing of it was, prior to the Land Transfer Act, 1897, entitled to probate, and it was liable to probate and legacy duty (*e*). So money covenanted to be laid out in land descends as land (*f*).

Person absolutely entitled in either form may elect.

But anybody entitled to take in either form may elect that, instead of its being converted into money, or instead of its being converted into land, it shall remain in the form in which it is actually found. The only question in each

(*c*) Fletcher *v.* Ashburner, (1779) 1 Bro. C. C. 497, 499 ; and see Williams (10th ed.) 495 *et seq.*

(*d*) Williams (10th ed.) 496.

(*e*) In the Goods of Gunn, (1884) 9 P. D. 242.

(*f*) Edwards *v.* Countess of Warwick, (1723) 2 P. Wms. 171.

particular case is whether there have been acts sufficient to enable the Court to say that the party has so determined (*g*).

Money being once clearly impressed with real uses as land, will remain so impressed for the benefit of the heir, until put an end to either by the money being at home, by coming to the possession of the person who would be entitled to the land when purchased, or, if it is in the hands of a third person, by some act of the absolute owner showing an election to take it as money (*h*).

Slight evidence sufficient to show intention to retain property in form in which it is.

Slight evidence is sufficient to show an intention to retain the property in the form in which it is actually found. For instance, remaining in possession and receiving the rents for nine years without taking any steps to have the estate sold was held sufficient (*i*); but where real estate, given upon trust for sale, was subject to an option to a tenant under a lease to purchase the reversion, that was considered sufficient reason why no steps had been taken to convert, and receipt of rent under those circumstances was held not to be evidence of a reconversion (*k*).

To effect reconversion there must be concurrence of absolute owners.

To effect a reconversion there must be the concurrence of the absolute owners. There cannot be a reconversion if one of the parties has only a limited or defeasible interest (*l*). So where money was liable to be invested in land to be settled to uses in strict settlement and all the uses were exhausted except a legal jointure, it was held that as the jointress had an equity to compel the investment of the money in land, by reason of the bargain that she should have a legal rent charge on freehold estate, the land must be treated as real estate as between the real and personal representatives of the person who, subject to the jointure, was entitled thereto (*m*).

(*g*) Harcourt *v.* Seymour, (1851) 2 Sim. (N. S.) 12, 45; *Re* Lord Grimthorpe, [1908] 1 Ch. 666; 2 Ch. 675.

(*h*) Wheldale *v.* Partridge, (1803) 8 Ves. 235; *Re* Pedder's Settlement, (1854) 5 D. M. & G. 890.

(*i*) *Re* Gordon, (1877) 6 C. D. 531. In Kirkham *v.* Miles, (1807) 13 Ves. 338, two years' possession was held to be too short to presume an election.

(*k*) *Re* Lewis, (1885) 30 C. D. 654. See other cases in Williams (10th ed.) 496, n. (*b*).

(*l*) Sisson *v.* Giles, (1863) 3 De G. J. & S. 614; *Re* Douglas and Powell's Contract, [1902] 2 Ch. 296, 312.

(*m*) Walrond *v.* Rosslyn, (1879) 11 C. D. 640.

But it would seem that it would be otherwise as to portioners (*n*).

A man entitled to the proceeds of sale of an estate in a contingent event may elect that if that event happens he will have the land itself instead of the money. He cannot do anything to interfere with the interests of third parties, but subject to this his election made while his interest is contingent is just as binding when the contingency happens as if it were given afterwards (*o*).

A man entitled contingently may elect contingently.

Where there is a trust for sale all the *cestuis que trust* must be absolutely entitled and concur in applying for a conveyance in lieu of a sale in order to obviate the need for a sale (*p*), and until they do so the trust for sale and any discretionary power to postpone sale continue (*q*), and by the Conveyancing Act, 1911, s. 10 (3), for the protection of any purchaser, the trust is to be deemed subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale.

Where trust for sale, all *cestuis que trust* to concur.

Equitable conversion is a conversion for the purposes of the Will and does not affect the rights of the persons who take by law independent of the Will. If, therefore, there is a trust to sell real estate for the purposes of the Will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the Statutes of Distribution as next-of-kin (*r*).

Equitable conversion only for purposes of the Will.

Where real estate is devised upon trust for conversion into personalty to be held upon trusts which in the result partially fail the proceeds of the land sold and the

On partial failure heir or next-of-kin claiming undisposed of

(*n*) *Ibid.*

(*o*) Meek *v.* Devenish, (1877) 6 C. D. 566, 572.

(*p*) *Re* Tweedie & Miles, (1884) 27 C. D. 315.

(*q*) *Re* Horsnaill, [1909] 1 Ch. 631.

(*r*) Ackroyd *v.* Smithson, (1779) 1 Bro. C. C. 503; Curteis *v.* Wormald, (1878) 10 C. D. 172, 175.

interest takes it in character the instrument has impressed upon it.

land (if any) unsold both result to the heir as personal estate (*s*).

On the other hand where personal estate is bequeathed upon trusts for conversion into land to be held on trusts which ultimately fail, land purchased before the failure of the trusts goes to the next-of-kin as real estate (*t*).

If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of the personal estate. On the other hand, if the next-of-kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death : it will go to the devisee of real estate, or to his heir-at-law if he has not devised it, and will pass as real estate (*u*). The title of his heir-at-law or next-of-kin, as the case may be, is fixed at his death (*x*).

On total failure property devolves as if no direction made.

If there is a total failure of the objects for which under the Will the conversion was to be made, the property will devolve as if no conversion had been directed (*y*).

Testator may by Will preclude all questions.

What sufficient indication to exclude heir.

The testator may, however, by his Will, change the nature of his real estate, to all intents and purposes, by disposing of it so as to preclude all questions between his real and personal representatives after his death (*z*). But in order to exclude the heir, it is not enough that the testator shows an intention that his real estate should be treated as money after his death ; it must also be apparent that he meant it to be treated as if he had himself actually converted it into personal estate before his death, and therefore as personal estate for all intents and purposes, whether the purposes of the Will take effect or not, and not merely for the purposes of his Will (*a*). The mere intention to exclude

(*s*) *Re* Richerson, [1892] 1 Ch. 379.

(*t*) Curteis *v.* Wormald, *ubi sup.*

(*u*) Curteis *v.* Wormald, *ubi sup.* See also per Ld. Westbury in Bective *v.* Hodgson, (1864) 10 H. L. C. 656.

(*x*) *Re* Richerson, *ubi sup.*

(*y*) *Re* Richerson p. 382.

(*z*) Johnson *v.* Woods, (1840) 2 Beav. 409 ; Taylor *v.* Taylor, (1853) 3 De G. M. & G. 190.

(*a*) See Williams (10th ed.) 500, and Fitch *v.* Weber, (1848) 6 Ha. 145, 148.

the heir however explicit will be void, unless there is a gift to some one else (*b*).

Same principles apply to partial failure of disposition of a mixed fund.

The above principles apply to a mixed fund of real and personal estate directed to be converted where there is a partial failure of the disposition by the death of some of the residuary legatees in the lifetime of the testator. So far as the lapsed shares are constituted of personal estate they go to the next-of-kin, and so far as they are constituted of real estate, to the heir-at-law (*c*).

Legacies payable *pro rata*.

Where there is a general direction to pay legacies out of a mixed fund, as where real and personal estates are given upon trust for sale and the legacies are directed to be paid out of the proceeds, the legacies are payable *pro rata* out of the real and personal estate in the event of the ultimate residue being undisposed of (*d*).

When residuary legatee entitled.

A question may arise in a Will in which there is a direction for the conversion of real estate and also a residuary bequest whether the surplus proceeds pass to the residuary legatee. This will depend on the meaning to be derived from the consideration of the whole context of the particular Will which has to be construed. If the term "residuary legatee" is found standing alone, above all, if it is found in a Will which appears to make a division between real property and personal property, the *primâ facie* meaning of "residuary legatee" would be the person taking what the law calls the residue of the personal property; but it is a term which must be fashioned and moulded by the context, and if you have a context in which the testator is found looking at his landed property not as land but as something which is all to be sold and turned into money, then the term "residuary legatee" becomes a term as applicable to the proceeds of landed property as it would have been in the first instance to personal property (*e*).

(*b*) Fitch *v.* Weber (1848), 6 Ha. at p. 152.

(*c*) Ackroyd *v.* Smithson, (1779) 1 Bro. C. C. 503.

(*d*) Allan *v.* Gott, (1872) L. R. 7 Ch. 439; *Re* Spencer Cooper, [1908] 1 Ch. 130; and see *post*, p. 560, as to mixed fund for payment of debts.

(*e*) Per Ld. Cairns in Singleton *v.* Tomlinson, (1878) 3 App. Cas. 404, 417.

Equitable conversion by contract or deed for all purposes.

Where conversion is directed by contract or deed it has effect in equity as from the date of the contract or the delivery of the deed for all purposes, and on the partial or total failure of the purposes for which conversion was directed, the property if land directed to be sold results to the settlor as personalty, and if money, directed to be invested in the purchase of land results to the settlor as land, provided that on the settlor's death there is an enforceable trust (*f*).

A valid contract for sale of real estate converts the estate in equity and makes the purchase-money a part of the personal estate of the vendor, and the land a part of the real estate of the purchaser (*g*). The vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid in the absence of express contract as to the time of delivering possession.

Effect of cancellation of contract after death of vendor.

If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death ; but if the contract is cancelled because there was some equitable ground for setting it aside, there will not be conversion, because there never was in equity a valid contract.

What is a valid contract.

To be a valid contract it must not only be binding on both parties, but the vendor must be in a position to make a title according to the contract, unless the purchaser has accepted the title in the lifetime of the vendor (*h*).

Effect of failure of pur-

If the contract for sale be valid at the death of the vendor,

For a summary of the rules of construction for determining whether conversion is directed for all the purposes of the Will, and the title of the residuary devisee or residuary legatee, see Theobald on Wills (7th ed.), pp. 255 *et seq.*

(*f*) Clarke *v.* Franklin, (1858) 4 K. & J. 257 ; *Re* Lord Grimthorpe, [1908] 1 Ch. 666 ; 2 Ch. 675.

(*g*) Lysaght *v.* Edwards, (1876) 2 C. D. 499, 506, 507.

(*h*) Lysaght *v.* Edwards, *ubi sup.* 499, 506.

but the purchaser loses his right to a specific performance by subsequent laches, the estate belongs to the next-of-kin and not to the heir-at-law (*i*).

chaser to perform contract.

If a man specifically devises real estate and afterwards sells it, although the purchase is not completed until after his death, or the money is allowed to remain on mortgage of the property, neither the purchase-money nor the sum secured by the mortgage passes to the specific devisee (*k*).

Specific devise adeemed by contract for sale by testator.

But conversion under a power of sale has no retrospective effect and does not divest the interest of the person entitled beneficially to the land at the time of conversion, but merely changes his interest from an interest in real estate to an interest in personal estate, so that his personal and not his real representatives would upon his death become entitled (*l*).

Where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, the exercise of the option causes it to relate back to the original agreement, that is the time of the creation of the option (*m*), although the heir or devisee will be entitled after the vendor's death to the rents up to the time the option is exercised (*n*).

Relation back on exercise of option to purchase.

The principle applies even though the option to purchase is not to be exercised until after the death of the grantor, and it is immaterial whether the grantor of the option dies testate or intestate (*o*).

But this doctrine would seem not to be consistent with the general principles applicable to cases of conversion, and has never been applied except as between the real and the personal representatives of the original creator of the option, and is not to be extended. Consequently, where an option to purchase was given by lease to the lessee, and under the terms of the lease the lessor covenanted to insure against fire,

Doctrine only applies as between real and personal representatives of original creator of option.

(*i*) Curre *v.* Bowyer, (1818) 5 Beav. 6, note (*b*).

(*k*) Farrar *v.* Earl of Winterton, (1842) 5 Beav. 1; Moor *v.* Raisbeck, 1841) 12 Sim. 123; *Re* Clowes, [1893] 1 Ch. 214.

(*l*) *Re* Dyson, [1910] 1 Ch. 750; and cf. *ante*, p. 285.

(*m*) Lawes *v.* Bennett, (1785) 1 Cox, 167.

(*n*) Townley *v.* Bedwell, (1808) 14 Ves. 590.

(*o*) *Re* Isaacs, [1894] 3 Ch. 506.

on the buildings being destroyed by fire before the exercise of the option, it was held that the subsequent exercise of the option would not cause it to relate back to the time of the creation of the option in such manner as to render the property for this purpose property of the purchaser as from the date of the lease giving the option, and the vendor trustee of the insurance money for the purchaser; since until the exercise of the option there being no specific performance of the contract possible, there is no conversion, and the principle of equity which considers that done which ought to be done and which the Court can compel to be done, extends so far back as those circumstances exist and no farther (*p*).

Option in lease to purchase fee simple.

An option to the lessee to purchase the fee simple contained in a lease is an integral part of the lease and passes with it to the personal representative of the deceased lessee, and if exercised by the personal representative of the deceased lessee no equitable interest in real estate descends to the heir (*q*).

Inference from devise after contract giving option.

The testator may, however, sufficiently indicate an intention that the rule shall not apply; as in the case of a Will made after a contract giving an option to purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into (*r*). The same inference will be drawn where the testator executed a codicil on the same day that he granted a lease of the specifically devised property with an option of purchase to the lessee (*s*). But the case is different when, after having given the property by Will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away (*t*).

(*p*) Edwards *v.* West, (1878) 7 C. D. 858. The mere fact of making a contract for purchase and sale does not pass any interest in a subsisting fire policy, there must be a bargain with regard to the policy in order to pass the interest: Rayner *v.* Preston, (1881) 18 C. D. 1.

(*q*) *Re* Adams and Kensington Vestry, (1883) 24 C. D. 199, (C. A.) 27 C. D. 394; and see *post*, p. 307.

(*r*) Per Page Wood, V.-C., in Weeding *v.* Weeding, (1861) 1 J. & H. 424, 431.

(*s*) *Re* Pyle, [1895] 1 Ch. 724.

(*t*) Weeding *v.* Weeding, *ubi sup.*

Order for sale of real estate in administration action.

Order for sale of infant's real estate.

If the Court, in the exercise of its jurisdiction, in an administration action, makes an order for sale of land, it operates as a conversion from the date of the order and before any sale has taken place (*a*). So where the Court has power to sell an infant's real estate, and orders it to be sold in an administration action, the order operates as a conversion, and the estate then becomes personalty, but an order for sale of an infant's real estate in a partition action does not operate as a conversion (*b*).

Order for sale for limited purpose.

Even where there is an order for sale of real estate for a limited purpose, as, for instance, for payment of an infant's share of costs in administration or other proceedings, or of the mortgage debt and interest in a foreclosure action, any surplus proceeds in excess of what is required will devolve as personal estate (*c*).

Effect of Partition Act, 1876.

But having regard to s. 6 of the Partition Act, 1876 (39 & 40 Vict. c. 17), where the order for sale is not founded upon the infant's interest, and in effect the Court reserves for future consideration, if necessary, whether the sale is for the benefit of the infant in the event of the other parties not being entitled to ask for an order for sale, it would seem that there is no conversion of the infant's share, and the proceeds of sale should be earmarked as real estate (*d*).

Order for sale or mortgage of lunatic's property under 53 Vict. c. 5.

By the Lunacy Act, 1890 (53 Vict. c. 5), s. 117, the judge may order any property of a lunatic to be sold, charged, mortgaged, dealt with or disposed of as he thinks most expedient for the purpose of raising or securing money to be or which has been applied for the purposes mentioned in the Act, and s. 123 (1) provides that the lunatic, his heirs executors,

(*a*) Steed *v.* Preece, (1874) L. R. 18 Eq. 192; Hyett *v.* Mekin, (1884) 25 C. D. 735; Fauntleroy *v.* Beebe, [1911] 2 Ch. 257. Same principle applies under an order for sale of timber: Dyer *v.* Dyer, (1865) 34 Beav. 504; Hartley *v.* Pendarves, [1901] 2 Ch. 498; also of property in a partition action: *Re* Dodson, [1908] 2 Ch. 638; Herbert *v.* Herbert, [1912] 2 Ch. 268, except in regard to a person under disability, *e.g.*, infancy, coverture, or lunacy: *ibid.*, and Hopkinson *v.* Richardson, [1913] 1 Ch. 284.

(*b*) Hopkinson *v.* Richardson, *ubi sup.*, not following Wallace *v.* Greenwood, (1880) 16 C. D. 362.

(*c*) Burgess *v.* Booth, [1908] 2 Ch. 648, not following Scott *v.* Scott, (1882) 9 L. R. Ir. 367.

(*d*) *Re* Norton, [1900] 1 Ch. 101.

administrators, next-of-kin, devisees, legatees and assigns shall have the same interest in any moneys arising under the powers of the Act which may not have been applied under such powers as he or they would have had in the property if no sale, mortgage or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of.

Money spent on permanent improvements of lunatic's property may be made a charge.

Sect. 118 authorises the judge to order that money expended on permanent improvements shall be a charge upon the improved property or any other property of the lunatic (*e*).

Rights of heir and next-of-kin of lunatic apart from Act.

Apart from this Act, should the judge in lunacy make any order by which the nature of one part of the lunatic's estate should be altered for the improvement of the other, there is no equity between the heir-at-law and next-of-kin on the lunatic's death to have the nature of the property restored (*f*).

Where under an order in lunacy, in the matter of a person of unsound mind not so found by inquisition, the reversion in fee of leasehold hereditaments had been purchased, on the death of the lunatic it was held that the term had merged in the freehold reversion, and the hereditaments, being in fact freehold at the death of the lunatic, passed to the heir (*g*).

On a sale under compulsory powers.

When property is taken under the compulsory powers of an Act of Parliament, a notice given to an owner in fee who dies before steps are taken to ascertain the amount of compensation, although the company has been let into possession, will not effect a conversion, since no contract had been entered into in the owner's lifetime which could be specifically enforced (*h*); but a conversion takes place when the amount of the purchase money is agreed upon by the surveyors, although there is no contract in writing (*i*).

(*e*) The principles which guide the Court in making orders under this section were considered in *Re* Gist, [1904] 1 Ch. 398.

(*f*) See Williams (10th ed.) 505; and see *ante*, p. 279.

(*g*) *Re* Searle, [1912] 2 Ch. 365.

(*h*) Righton *v.* Righton, (1866) 36 L. J. Ch. 61.

(*i*) *Re* Hawkins, (1843) 13 Sim. 569; Watts *v.* Watts, (1873) L. R. 17 Eq. 217.

Distinction between s. 69 and s. 76 of 8 Vict. c. 18 as to purchase money.

Purchase money payable to parties under disability and paid into Court under s. 69 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), is liable to be reinvested in the purchase of other lands, and is, therefore, impressed with the quality of real estate, and there is no constructive reconversion until some person becomes absolutely entitled to the money to his or her own use ; but if paid in under s. 76 of the Act, by reason of the owner of the land refusing to accept the money, or failing to make out a title, or to convey, or for other reasons mentioned in that section, the money is applicable under s. 78 and is personal estate (*k*).

Sect. 10.—*Of Partnership Assets.*

All partnership property impressed with character of personalty.

All property of what nature soever bought with the cash and for the purposes of a trading partnership concern, must in equity be looked upon as personal, unless there be an agreement to the contrary (*l*). So also if land, whether acquired by descent or devise, is appropriated to partnership purposes and is involved in the business, it becomes part of the partnership property, and the share of a deceased partner is personal estate (*m*), and there can be no survivorship in it in equity, although the property was conveyed to the partners as joint tenants (*n*). In the case of partnership property land can be remitted to its original character only by virtue of such an agreement made between the partners as withdraws the land from the partnership assets (*o*).

(*k*) *Re* Harrop, (1857) 3 Drewry, 726 ; Kelland *v.* Fulford, (1877) 6 C. D. 491.

(*l*) Smith's Mercantile Law (10th ed.) 181.

(*m*) Waterer *v.* Waterer, (1873) L. R. 15 Eq. 402.

(*n*) Davies *v.* Games, (1879) 12 C. D. 813.

(*o*) Att.-Gen. *v.* Hubbuck, (1884) 13 Q. B. D. 275.

CHAPTER XIX.

OF CHOSES IN ACTION.

SECT. 1.—*Of Rights accrued in the Lifetime of the Testator or Intestate.*

(1) *Ex contractu.*

RIGHTS of action founded upon any obligation, contract, debt, covenant or other duty, including a statutory duty to the deceased (*a*), survive to the personal representative of the deceased in whom the right was vested (*b*). And the executor or administrator need not be named in the terms of the contract, in order to transmit to him the right of enforcing it (*c*).

Rights founded on contract or duty survive to personal representative.

Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent (*d*), and master and servant (*e*), the death of either party puts an end to the relation ; and in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. So also an agreement to compose a work is discharged by the death of the author (*f*). And in the absence of special agreement the interest of the master in an apprenticeship, being an interest coupled with a personal trust, cannot be assigned and is

Contracts founded on personal considerations do not survive unless otherwise agreed,

e.g., principal and agent,

master and servant,

author and publisher,

master and apprentice.

(*a*) Peebles *v.* The Oswaldtwistle Urban District Council, [1896] 2 Q. B. 159 ; Darlington *v.* Roscoe & Sons, [1907] 1 K. B. 219.

(*b*) See Williams (10th ed.) 604.

(*c*) Williams (10th ed.) 605.

(*d*) Campanari *v.* Woodburn, (1854) 15 C. B. 400. Commission in respect of business introduced by agent may continue payable notwithstanding his death : Wilson *v.* Harper, [1908] 2 Ch. 370.

(*e*) Farrow *v.* Wilson, (1869) L. R. 4 C. P. 744, 746.

(*f*) Marshall *v.* Broadhurst, (1831) 1 Tyrw. 348, 349, per Ld. Lyndhurst, and as to the personal nature of a publishing agreement see Stevens *v.* Benning, (1854) 1 K. & J. 168, aff. 6 D. M. & G. 223 ; Hole *v.* Bradbury, (1879) 12 C. D. 886 ; Griffith *v.* Tower Publishing Co., Ltd. and Moncrieff, [1897] 1 Ch. 21.

determined by his death (*g*) ; and on the death of the master an action is not maintainable by an apprentice or pupil for the recovery of any part of the premium paid under the indenture by the apprentice or pupil to the master, there being in such case only a partial failure of consideration (*h*).

Rights of parish apprentices regulated by 32 Geo. III. c. 57.

The law relating to parish apprentices is regulated by stat. 32 Geo. III. c. 57.

Liability under bastardy order or contract.

The statutory obligation under a bastardy order of the father of a bastard ceases on the father's death and no action will lie by the mother to recover arrears or the subsequent weekly payments (*i*). So also under an agreement between the father of a bastard and the mother whereby in consideration of weekly payments to be made by the father to the mother until the child should attain a certain age, the mother agreed not to apply for a bastardy order and to maintain and bring up the child, the father's obligation comes to an end on the mother's death and her administrator has no right of action being a personal contract with the mother which she alone could carry out (*k*).

An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party (*l*).

Action for account, origin of.

An action for an account was given to executors by 13 Edw. I. stat. 1, c. 23 ; to executors of executors by 25 Edw. III. stat. 5, c. 5 ; and to administrators by 31 Edw. III. stat. 1, c. 11.

(2) *Ex delicto.*

At common law.

It was a principle of the common law, that if an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the

(*g*) Williams (10th ed.) 626.

(*h*) Whincup *v.* Hughes, (1871) L. R. 6 C. P. 78 ; Ferns *v.* Carr, (1885) 28 C. D. 409 ; *Re* Thompson, (1848) 1 Ex. 864.

(*i*) *Re* Harrington, [1908] 2 Ch. 687.

(*k*) James *v.* Morgan, [1909] 1 K. B. 564.

(*l*) Williams (10th ed.) 621.

action died with the person to whom or by whom the wrong was done (*m*).

Effect of statutes of Edw. III. as to injury to personal estate.

But by the stat. 4 Edw. III. c. 7, *de bonis asportatis in vitâ testatoris*, which reciting, that in times past, executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and so as such trespasses have remained unpunished, enacts, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be should have had if they were living. And this remedy is further extended to executors of executors, by 25 Edw. III. stat. 5, c. 5, and to administrators by an equitable construction of the former statute. The Act 4 Edw. III. being a remedial law, has always been expounded largely ; and though it makes use of the word trespasses only, has been extended to other cases within the meaning and intent of the statute. Therefore by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased might have had, whatever the form of action may be (*n*).

These statutes do not extend to injuries to the person or the freehold of deceased.

But the statute of Edw. III. does not extend to injuries done to the person or to the freehold of the testator. Therefore an executor or administrator shall not have actions of assault or battery, false imprisonment, libel, slander, deceit, nor (unless by virtue of the stat. 3 & 4 Will. IV. c. 42, s. 2, hereafter to be mentioned) for diverting a watercourse, obstructing lights, or other actions of the like kind ; for such causes of action still die with the testator (*o*).

An action for defamation either of private character or of a person in relation to his trade comes to an end on the death of the plaintiff, but an action for the publication of a false

(*m*) Williams (10th ed.) 606.

(*n*) *Ibid ;* and see Twycross *v.* Grant, (1878) 4 C. P. D. 40.

(*o*) Williams (10th ed.) 608 ; and see Twycross *v.* Grant, *ubi sup.*

and malicious statement causing damage to the plaintiff's personal estate, as for instance slander of title to the plaintiff's trade mark, survives (*p*). So also an action for breach of promise of marriage does not survive unless special damage to the property of the promisee, arising from and within the contemplation of both parties at the date of the promise, can be proved (*q*). But there is no decision which supports the proposition that because in consequence of injury done to the person the person injured is put to expense the case is brought within the category of cases to which the statute of Edw. III. applies ; for instance the personal representative cannot sue, in respect of damage to the deceased's estate, for medical expenses or loss of occupation arising from the tortious injury to the deceased's person (*r*).

Damages in divorce suit.

Where damages had been assessed against a co-respondent in a divorce suit and he died before the decree *nisi* was made absolute, it was held that the action was a personal action and the cause of action did not survive, and that there was no provision in the Divorce Acts or Rules enabling the executor of a co-respondent to be brought before the Court (*s*).

Jurisdiction over money paid into Court in action before death.

Notwithstanding an action is at an end by reason of the death of the plaintiff or defendant and cannot be revived, if money has been paid into Court, the Court has jurisdiction on the application of the personal representatives of the deceased party to order the money to be paid out to them on showing such grounds as the deceased would have had to show if he had been alive and the action was still in existence (*t*).

Effect of 3 & 4 Will. IV. c. 42, as to injury to real estate.

By stat. 3 & 4 Will. IV. c. 42, s. 2, after reciting that no remedy is provided by law for injuries to the real estate of any person deceased committed in his lifetime, it is enacted, " that an action of trespass, or trespass on the case, as the

(*p*) Hatchard *v.* Mege, (1887) 18 Q. B. D. 771.

(*q*) Finlay *v.* Chirney, (1888) 20 Q. B. D. 494.

(*r*) Pulling *v.* The Great Eastern Railway Co., (1882) 9 Q. B. D. 110.

(*s*) Brydges *v.* Brydges and Wood, [1909] P. 187.

(*t*) Brown *v.* Feeney, [1906] 1 K. B. 563 ; Maxwell *v.* Viscount Wolseley, [1907] 1 K. B. 274.

case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person."

Injury must be within six months before death, and action must be brought within one year after.

Damages recovered by personal action in respect of injury to land do not accrue to the inheritance, but are the personal estate of the person who recovered them, and who being tenant for life will belong to him or his personal representative and not to the remainderman (*u*). This principle applies also where damages were under a lease granted by the tenant for life in exercise of powers conferred by the Settled Land Acts (*x*). But although there is no equity to compel the tenant for life to hand over to the trustees money he has so recovered, yet money recovered by the trustees as damages must be treated as corpus unless the tenant for life is entitled thereto under the words of the settlement (*y*).

Damages do not accrue to the inheritance.

The Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), commonly known as Lord Campbell's Act, enacts: "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Effect of the Fatal Accidents Act, 1846.

By s. 2: "Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by

(*u*) Noble *v.* Cass, (1828) 2 Sim. 343.
(*x*) *Re* Lacon's Settlement, [1911] 2 Ch. 17; *Re* Dealtry, [1913] W. N. 138.
(*y*) *Re* Pyke, [1912] 1 Ch. 770.

and in the name of the executor or administrator of the person deceased ; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought ; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

By s. 3 : " Not more than one action shall lie for and in respect of the same subject-matter of complaint ; and that every such action shall be commenced within twelve calendar months after the death of such deceased person " (*z*).

An action can only be maintained by the representative of a deceased person under this Act where that person could, if alive, have himself maintained an action in respect of his injuries against the defendant. Consequently it cannot be maintained against a public authority unless commenced within the time limited by s. 1 of the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61) (*a*).

A father cannot recover, either at common law or under the Act, the funeral expenses of burying an unmarried infant daughter (*b*).

Fatal Accidents Act, 1864, enables action, if not brought by executor or administrator, to be brought in names of persons for whose benefit it is.

By the Fatal Accidents Act, 1864 (27 & 28 Vict. c. 95), s. 1, if it shall happen that no such action as is mentioned in the Act 9 & 10 Vict. c. 93 shall within six calendar months after the death have been brought by the executor or administrator, such action may be brought by and in the name of the persons for whose benefit such action would have been, if it had been brought by and in the name of the executor or administrator.

Measure of damages.

The right conferred by Lord Campbell's Act to recover damages is restricted to the actual pecuniary loss, or the loss of the reasonable probability of pecuniary benefit,

(*z*) See Williams (10th ed.) 612 *et seq.*, for cases decided on this Act.

(*a*) Williams *v.* Mersey Docks and Harbour Board, [1905] 1 K. B. 804.

(*b*) Clark *v.* London General Omnibus Co., [1906] 2 K. B. 648.

sustained by each individual entitled to sue. When a man has no means of his own and earns nothing, and there is no reasonable probability of his earning anything, his wife and children cannot be pecuniary losers by his decease. In like manner when by his death the whole estate from which he derived his income passes to his widow or children no statutory claim will lie at their instance. A different case arises when the means of the deceased have been exclusively derived from his own exertions, whether physical or intellectual. All circumstances, which though insufficient to exclude a statutory claim may be legitimately pleaded in diminution of it, ought to be considered in assessing damages (*c*), but there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance (*d*).

Action under the Act no bar to subsequent action by representatives in respect of the estate of deceased.

An action by the personal representative under the Act is no bar to an action by the same person in respect of the assets and estate of the deceased, and an admission on the record made in the one action cannot be treated as an estoppel of which either party can take advantage of, for, although the machinery nominally is the same, the entire object and effect of the actions are different, and they are brought in different rights ; the personal representative in a case under the Act does not sue in respect of anything which belonged to the deceased, but by force of the statute which enacts that the deceased's death is to be made the subject of an action just as if he had lived (*e*).

Effect of the Employers' Liability Act, 1880.

The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), enacts that where personal injury is caused to a workman in any of the various ways mentioned in s. 1, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and

(*c*) Pym *v.* Great Northern Railway Co., (1863) 4 B. & S. 396 ; Grand Trunk Railway Co. of Canada *v.* Jennings, (1888) 13 A. C. 800, 804.

(*d*) 8 Edw. VII. c. 7.

(*e*) Leggott *v.* Great Northern Railway Co., (1876) 1 Q. B. D. 599.

remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Sect. 2 enumerates cases in which the workman shall not be entitled to any right of compensation or remedy under the Act.

Sect. 3 limits the amount of compensation recoverable under the Act.

And s. 4 provides that an action under the Act shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death : provided that, in case of death, the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

By s. 5 money payable under any penalty is to be deducted from compensation awarded.

Sect. 6 assigns the trial of actions under the Act to the County Court, subject to removal into the superior Court.

Effect of the Workmen's Compensation Act, 1906.

The Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58) (which repealed the Workmen's Compensation Acts, 1897 and 1900), makes further provision (s. 1) for the liability of certain employers to workmen as defined by the Act suffering personal injury by accident arising out of and in the course of their employment. By s. 13 any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable. If not settled by agreement the amount of compensation under the Act, where death results from the injury, is subject to the scale and conditions of compensation provided by the first schedule to the Act, and it is thereby provided that the payment in the case of death shall, unless otherwise ordered as thereinafter provided, be paid into the County Court, and

any sum so paid into Court shall, subject to rules of Court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the Court in such manner as the Court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act, and the receipt of the registrar of the Court shall be a sufficient discharge in respect of the amount paid in: Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependants, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due.

By s. 2 (1) proceedings for recovery of compensation shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death.

Where a claim is made by a sole dependant of a deceased workman, as for instance his widow, and the dependant dies before any award is made in respect of the claim the right to compensation survives and passes to the legal personal representative of the deceased dependant (*f*).

Sect. 1 (2) (b) of the Act of 1906 provides that: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take proceedings independently of this Act; but the employer shall not be liable to pay

(*f*) Darlington *v.* Roscoe & Sons, [1907] 1 K. B. 219; United Collieries, Ltd. *v.* Simpson, [1909] A. C. 383. As to who is a "dependant," see McLean *v.* Moss Bay Iron and Steel Co., Ltd., [1909] 2 K. B. 521; Orrell Colliery Co. *v.* Schofield, [1909] A. C. 433; Ward *v.* H. S. Pitt & Co., [1913] 2 K. B. 130.

compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid " (*g*).

(3) *Contracts connected with Land.*

Covenants running with the land descend to the heir,

With respect to contracts relating to the freehold, a covenant which runs with the land will go to the heir, not only without naming him, but where it is made with the covenantee and his executors (*h*). Moreover, the covenantee need not be made a party to the deed of covenant (*i*). And although such a covenant has been broken in the lifetime of the testator, or intestate, if the substantial damage, as, for instance, eviction, has taken place since his death, the real representative, and not the personal, is the proper plaintiff. But when the ultimate damage is sustained in the lifetime of the ancestor, as where he is evicted, and the land, and consequently the covenant, does not descend to the heir, there the personal representative only can sue upon the covenant (*j*). The case of *Kingdon* v. *Nottle* (*k*), upon a covenant for title, and *King* v. *Jones* (*l*) upon a covenant for further assurance, are authorities to show that these covenants are continuing covenants, and the breaches of them continuing breaches, and that a right of action accrues *toties quoties* when and as often as damage actually arises from the breach of either covenant (*m*).

unless ultimate damage is sustained in ancestor's lifetime.

(*g*) See Rouse *v.* Dixon, [1904] 2 K. B. 628, as to a claim made and withdrawn being no bar to subsequent action.

(*h*) See Williams (10th ed.) 619, and cases referred to. For an explanation of the distinction between covenants running with the land and covenants merely collateral, see Dewar *v.* Goodman, [1907] 1 K. B. 612; [1908] 1 K. B. 94; [1909] A. C. 72.

(*i*) See 8 & 9 Vict. c. 106, s. 5; 44 & 45 Vict. c. 41, s. 58 (1); Forster *v.* Elvet Colliery Co., Ltd., [1908] 1 K. B. 629; S. C., Dyson *v.* Forster, [1909] A. C. 98.

(*j*) King *v.* Jones, (1814) 5 Taunt. 418; aff. 4 M. & S. 188, and see Williams (10th ed.) 619 *et seq.*

(*k*) (1813) 1 M. & S. 355; (1815) 4 M. & S. 53.

(*l*) *Ubi sup.*

(*m*) Spoor *v.* Green, (1874) L. R. 9 Ex. 99, 117, per Kelly, C.B.; but see Turner *v.* Moon, [1901] 2 Ch. 825, where the breach of covenant for title

Effect of 32 Hen. VIII. c. 34, relating to actions by or against grantees of reversions.

The stat. 32 Hen. VIII. c. 34, expressly enabled grantees of reversions to take advantage of conditions and covenants against lessees, their executors, administrators and assigns, of the same lands, and also gave to lessees, their executors, administrators and assigns, the like remedy against the grantees of the reversions which they might have had against the grantors (*n*).

The statute extends to a grantee or assignee of part of a reversion, and rent is apportionable in such case, and a fair proportion may be claimed (*o*).

Effect of the Land Transfer Act, 1897.

Since the Land Transfer Act, 1897, on the death of the owner of a reversion in real estate within the Act, his executor or administrator is the only party capable of suing on a covenant made with the lessor until assent or conveyance under s. 3 (1) of the Act.

Collateral covenants.

A covenant in an underlease by the underlessor to perform the covenants in the superior lease relating to premises not demised by the underlease does not run with the land, and is only a collateral covenant, and a covenant to indemnify is only personal (*p*). But as between landlord and tenant, it would seem, a covenant may touch and concern the land demised although nothing has to be done on the land demised, as for instance a covenant by the lessor and his assigns not to erect or permit to be erected any buildings in front of a building line on land adjoining the demised premises (*q*).

Option in lease to the lessee to purchase the fee simple.

Although an option contained in a lease to the lessee to purchase the fee simple of the land demised forms an integral part of the lease and passes with it to the personal representative of the lessee as personal estate, with the right to enforce it if he should think it beneficial, and under it no equitable

by reason of the existence of an undisclosed right of way was held to be single, entire and complete upon the execution of the conveyance; followed in Great Western Railway Co. *v.* Fisher, [1905] 1 Ch. 316.

(*n*) See notes on this Act in Chitty's Statutes.

(*o*) Mayor of Swansea *v.* Thomas, (1882) 10 Q. B. D. 48.

(*p*) Dewar *v.* Goodman, [1909] A. C. 72.

(*q*) Ricketts *v.* Enfield Churchwardens, [1909] 1 Ch. 544.

interest in real estate descends to the heir (*r*), yet such an option given by way of proviso or covenant in a lease does not come within the stat. 32 Hen. VIII. c. 34, so as to make the liability to perform it run with the reversion, and consequently an action by an assignee of the lease against assigns of the lessor cannot be maintained to compel a conveyance(*s*).

An option must not exceed the limit allowed by the rule against perpetuities (*t*).

Effect of the Conveyancing Act, 1881, s. 10, as to rent reserved by lease, and benefit of lessee's covenants, and of condition of re-entry.

Sect. 10 (1) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that "(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of the reversionary estate, and shall be capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased."

Sect. 11, as to obligation of lessor's covenants.

Sect. 11 (1) provides that "The obligation of a covenant entered into by a lessor with reference to the subject-matter of a lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be

(*r*) *Re* Adams and Kensington Vestry, (1883) 24 C. D. 199; 27 C. D. 394.

(*s*) Woodall *v.* Clifton, [1905] 2 Ch. 257.

(*t*) *Ibid.*

taken advantage of and enforced against any person so entitled."

These sections apply only to leases made after the commencement of the Act (*u*) ; and by s. 2 of the Conveyancing Act, 1911, s. 10 is now extended to the case of a person becoming, by conveyance or otherwise, entitled after the condition of re-entry or forfeiture had become enforceable.

(4) *Of Rent and Arrearages.*

Different kinds of rents.

At common law there are three kinds of rents : rent-service, rent-charge, and rent-seck (*x*).

At common law power of distress only attaches to rent-service.

Rent-service is where the rent accrues in connection with a tenure, whether by reason of the owner of the rent having the reversion of the land out of which it issues or having the mere seigniory, and to this rent there is attached a common law power of distress.

A rent-charge is where the owner of the rent has neither seigniory, nor reversion, but by express contract is entitled to distrain.

A rent-seck is where the owner of the rent has neither seigniory, nor reversion, nor any express power of distress.

Rents of assize, chief rents and quit rents are customary rents under which tenants of a manor hold under the lord from time immemorial.

A fee farm rent is where an estate in fee is granted subject to a rent in fee, which, if created since the Statute of *Quia Emptores*, cannot be a rent-service and must be either a rent-seck or rent-charge.

Statutory power to distrain.

27 Hen. VIII. c. 10.

4 Geo. II. c. 28.

By the Statute of Uses (27 Hen. VIII. c. 10), s. 3, a power of distress is attached to rent-charges limited to uses or created under that statute ; and by 4 Geo. II. c. 28, the like remedy is given in cases of rent-seck, rents of assize, and chief rents.

44 & 45 Vict. c. 41.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44, a power to distrain is given to a

(*u*) As to the law previously see Wolstenholme on The Conveyancing and Settled Land Acts ; Challis R. P. (2nd ed.).

(*x*) See Stephen's Commentaries (5th ed.), vol. 1, pp. 682 *et seq.*

person entitled to receive out of any land, or out of the income of any land, any annual sum payable half-yearly or otherwise, whether charged on the land or the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion (*y*).

8 Edw. VII., c. 28.

The Agricultural Holdings Act, 1908 (8 Edw. VII. c. 28), s. 28, limits the right of distress to one year's arrears, instead of six years', in respect of a holding to which the Act applies.

Reversion necessary to found remedy by distress.

At common law a reversion is necessary to found the remedy by distress.

Underlease exceeding original term deprives underlessor of remedy by distress.

An underlease exceeding the original term deprives the underlessor of the remedy by distress for want of a reversion, and this defect is not remedied by the underlessor acquiring a reversionary lease commencing from the determination of the original lease, since a reversionary lease merely creates an *interesse termini* until entry thereunder and does not enlarge the term of the original lease (*z*).

Original term not enlarged by reversionary lease.

Rent severed from reversion may go to personal representative.

If the rent be reserved for years, and be severed from the reversion, it may then go to the executor or administrator, although the reversion goes to the heir. Thus if a man, seised of land in fee, makes a lease for years, reserving rent, and afterwards devises the rent to a stranger and dies, and the stranger is seised of the rent and dies, his executors shall have the rent and not his heirs. And though the whole rent which accrues after the death of the lessor should go with the reversion to the heir, yet the arrearages of rent, which became payable in his lifetime, will go to the lessor's personal representative as part of his personal estate (*a*).

So arrearages of rent are part of deceased's personal estate.

Personal representatives of deceased tenants in fee simple, in tail, or for lives of rents have by 32 Hen. VIII.

At common law the executors or administrators of tenants in fee simple, tenants in fee tail, and tenants for lives of rents, services, rent-charges, rent-secks, and fee farms had no remedy to recover arrearages of such rents, for remedy whereof the stat. 32 Hen. VIII. c. 37, s. 1, enacted that such executors and administrators should have an action of debt

(*y*) See Conveyancing Act, 1911, s. 6, excluding the application of the rule relating to perpetuities to any such powers or remedies.

(*z*) Lewis *v.* Baker, [1905] 1 Ch. 46.

(*a*) Williams (10th ed.) 631.

for all such arrearages against the tenant in arrear and his executors and administrators, and empowered them to distrain for the arrearages so long as the lands charged with the payment continued in the seisin or possession of the tenant in arrear or of any other person claiming only by and from the same tenant by purchase, gift or descent (*b*).

c. 37, double remedy by action of debt and distress to recover arrearages.

The statute applies only to cases in which the owner of the rent, if he had lived, might have distrained ; and therefore, if the rent be in arrear, and the owner grants away his interest and dies, his executors or administrators have no remedy for these arrearages (*c*).

Statute only applies where owner of rent, had he lived, could have distrained.

If a person seised in fee of land demised it for years, reserving rent, and died, his executor or administrator could not, under this statute, distrain for arrears of rent accrued in his lifetime, since the deceased was not tenant in fee simple, or tenant at all, of the rent or within the meaning of the statute (*d*).

Rent reserved on lease for years was not within the statute.

But by stat. 3 & 4 Will. IV. c. 42, s. 37, it was enacted, " that it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime in like manner as such lessor or landlord might have done in his lifetime." And s. 38 provides, " that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined ; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due."

Effect of 3 & 4 Will. IV. c. 42, s. 37, giving representatives of deceased lessor power to distrain.

The Land Transfer Act, 1897, would seem now to supersede this statute where the arrears and the immediate reversion both vest in the personal representative.

Effect of Land Transfer Act, 1897.

(*b*) Williams (10th ed.) 696.

(*c*) *Ibid.*, 631, 632.

(*d*) Prescott *v.* Boucher, (1832) 3 B. & Ad. 849 ; and see Jones *v.* Jones, (1832) 3 B. & Ad. 967, where Ld. Tenterden, C.J., approves the statement of the law on this subject as contained in Williams on Executors.

Action of debt for rent under leases for years.

Action of debt was at common law incident to rent reserved upon leases for years (*e*).

Against *terre* tenant.

So also since the abolition of real actions by 3 & 4 Will. IV. c. 27, s. 36, an action of debt will lie for arrears of rent-charge against the "*terre* tenant," that is the person having a freehold interest in the land, and is either in possession of the rents and profits at the time when the rent-charge accrues due (*f*), or has an immediate right to take possession, as in the case of a mortgagee who has the legal possession (*g*), and being in actual possession, or having the legal possession, he is liable although he has received no profits at all or less than the amount of the rent-charge (*h*).

(5) *Of Apportionment of Accruing Rent and other Periodical Payments.*

At common law no apportionment for accruing rent.

With regard to accruing rents, generally speaking at common law there was no apportionment in favour of the executor or administrator of the deceased tenant for life as against the heir or remainderman. In the case of a rent continuing after the death of the testator, the whole rent passed with the reversion to the remainderman or heir, and in the case of rents reserved in leases determining on the death of the person making them, or on the death of the tenant *pur autre vie*, the rent was lost altogether (*i*).

Apportionment Act, 1870.

The Apportionment Act, 1870 (33 & 34 Vict. c. 35), now provides as follows :

Rents, etc., to be considered as accruing from day to day and apportionable accordingly.

Sect. 2. "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

(*e*) See Prescott *v.* Boucher, (1832) 3 B. & Ad. 849, 856.

(*f*) Thomas *v.* Sylvester, (1873) L. R. 8 Q. B. 368.

(*g*) Cundiff *v.* Fitzsimmons, [1911] 1 K. B. 513.

(*h*) *Ibid.* ; Pertwee *v.* Townsend, [1896] 2 Q. B. 129.

(*i*) See Williams (10th ed.) 632.

Sect. 3. " The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before."

Apportioned part, when recoverable.

Sect. 4. " All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively ; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity."

Entire rent to be recovered by heir or other person entitled as if there had been no apportionment, and apportioned part recoverable from him.

Sect. 5. " In the construction of this Act—

" The word ' rents ' includes rent service, rent charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

" The word ' annuities ' includes salaries and pensions.

" The word ' dividends ' includes (besides dividends

strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise ; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word ' dividend ' does not include payments in the nature of a return or reimbursement of capital."

Sect. 6. " Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description."

Sect. 7. " The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

Act applies to specific devises ;

The Act applies to specific devises, and the rent being apportioned as on the day of the testator's death, the apportioned part will fall into the residuary personal estate (*k*).

also to specific bequests.

The income arising from personalty specifically bequeathed is also apportionable as between the specific legatee and the residuary legatee (*l*).

Act does not apply to purchases and sales by trustees of investments *cum* dividend ;

Where a fund is invested by trustees in stock on which a dividend is accruing, the Apportionment Act does not apply to the dividend when received, but the tenant for life is entitled to the whole dividend (*m*) ; nor does the Act apply to a sale of stock " *cum* dividend," although the purchase-money is thereby augmented (*n*). Where at date of purchase dividends have been earned and declared but not paid, the tenant for life is not entitled thereto, but when received are to be treated as capital (*o*).

(*k*) Hasluck *v.* Pedley, (1874) L. R. 19 Eq. 271.

(*l*) Pollock *v.* Pollock, (1874) L. R. 18 Eq. 329.

(*m*) *Re* Clarke, (1881) 18 C. D. 160.

(*n*) Bulkeley *v.* Stephens, [1896] 2 Ch. 241.

(*o*) *Re* Sir Robert Peel's Settled Estates, [1910] 1 Ch. 389.

nor to rent payable in advance.

The Act only applies to sums which are accruing but have not accrued due at the time when the apportionment is said to be required, and therefore the Act does not apply to rent payable in advance (*p*).

What is "a trading or other public company" under the Act.

The words "trading or other public companies" in s. 5 of the Act include any public company, but not a private partnership (*q*). Any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act (*r*). So also is a life assurance society, unincorporated but established by a deed of settlement (*s*).

What are "other periodical payments" under the Act.

The words "other periodical payments" in s. 2 of the Act refer to payments which are made periodically, recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and further, they must be in the nature of income, that is, coming in from some kind of investment, as in other cases with which the Act deals. Consequently the words have no application to profits arising from a private trading partnership (*t*), or from carrying on by trustees of the testator's own business (*u*). The profits made during a conventional period for taking accounts wholly included in the testator's lifetime, although not ascertained till some time after his death, must be treated as capital (*x*), but profits partly earned during the testator's lifetime are income (*y*).

No application to profits of private trading partnership.

Bonus to shareholders of public company, when apportionable.

The word "dividends" in s. 2 of the Act includes payments by way of bonus or surplus profits to the shareholders of a public company, even though such payments may be only occasional, and not strictly periodical, and are apportionable under the Act (*z*). With regard to whether a bonus

(*p*) Ellis *v.* Rowbotham, [1900] 1 Q. B. 740.

(*q*) Jones *v.* Ogle, (1872) L. R. 8 Ch. 192; *Re* Griffith, (1879) 12 C. D. 655.

(*r*) *Re* Lysaght, [1898] 1 Ch. 115, 122; *Re* White, [1913] 1 Ch. 231.

(*s*) *Re* Griffith, *ubi sup.*

(*t*) Jones *v.* Ogle, *ubi sup.*

(*u*) *Re* Cox's Trusts, (1878) 9 C. D. 159.

(*x*) Browne *v.* Collins, (1871) L. R. 12 Eq. 586.

(*y*) Ibbotson *v.* Elam, (1865) L. R. 1 Eq. 188.

(*z*) *Re* Griffith, *ubi sup.*

so declared should be treated as income apportionable or as capital, the general principle applicable is thus stated in *Bouch* v. *Sproule* (*a*) :—" When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income, shall be income, and what it says is capital, shall be capital." It was further laid down by the House of Lords in the same case that in considering whether a company has distributed its accumulated profits as dividends, or converted them into capital, regard must be paid both to the form and the substance of the transaction (*b*).

Articles of association of a company, though binding the shareholders, merely define and state the legal position as between them and the company, and a shareholder can deal with the dividends on his shares and effect or prevent apportionment notwithstanding the articles. Such articles, therefore, cannot amount to an express stipulation against apportioment within the meaning of s. 7 of the Act (*c*).

Act does not apply to fines, reliefs, or heriots.

With regard to payments such as fines on admittance to copyhold property, and reliefs or heriots payable on death or alienation of a tenant of a manor, if such payments became due before the death of the lord, they pass as fruit fallen as his personal estate, and do not go with the inheritance (*d*).

(*a*) (1885) 29 C. D. 635, 653 ; and see 12 App. Cas. 385, 397 ; and see *Re* Evans, [1913] 1 Ch. 23.

(*b*) See also per Stirling, J., in *Re* Malam, [1894] 3 Ch. 578, 585.

(*c*) *Re* Oppenheimer, [1907] 1 Ch. 399.

(*d*) See Williams (10th ed.) 636.

(6) *Copyright.*

The law relating to copyright in the deceased's interest in literary, dramatic, musical and artistic work, whether published or unpublished, is regulated by the Copyright Act, 1911 (*e*).

Duration of copyright.

The duration of copyright (except as otherwise expressly provided by this Act) is the life of the author and a period of fifty years after his death (*f*), but in the case of joint authorship it subsists during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer (*g*). Sect. 17 makes special provision in the case of a literary, dramatic or musical work, or an engraving not published or not performed in public at the date of the death of the author. Sect. 20 provides for copyright in photographs for a term of fifty years from the making of the original negative.

Ownership.

The author of a work is the first owner of the copyright (s. 5) except in certain special instances mentioned in s. 5 (1) (a) (b). The owner of the copyright may assign the right either wholly or partially, provided that where the author is the first owner, no assignment by him (otherwise than by Will) shall vest in the assignee any rights beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate ; but this proviso does not apply to the assignment of copyright in a collective work as defined by s. 35 (1), or a licence to publish a work or part of a work as part of a collective work (s. 5 (2)).

The property and copyright of an author in his work is personal property and vests in his personal representative (*h*),

(*e*) 1 & 2 Geo. V. c. 46, s. 31.
(*f*) *Ibid.*, s. 3.
(*g*) Sect. 16.
(*h*) Southey *v.* Sherwood, (1817) 2 Mer. 435 ; Burnett *v.* Chetwood, (1720) 2 Mer. 441, n.

who has the right to publish (*i*), and also the right to restrain others from publishing without his consent (*k*).

By s. 17 (2) the ownership of an author's manuscript after his death, when such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *primâ facie* proof of the copyright being with the owner of the manuscript.

Effect of death of author before agreement with publisher is complete.

Where an author agreed with a bookseller for publication of a work of science at a price according to a certain rate per sheet, payable by instalments as the work was published, and died after publication of one volume, constituting in itself a complete part, it was held that his representatives were entitled to the price of the finished portion according to the stipulated rate (*l*).

Proprietorship in letters.

With regard to proprietorship of copyright in letters, it is clear that at common law the property in the paper with the writing upon it—the actual physical thing, and nothing more—is in the person to whom the letter is sent, but the writer of the letter, notwithstanding that he has sent it to somebody else, and that that person has a right to the physical thing, retains that peculiar right of property which entitles him and his legal personal representatives to prevent its publication by others (*m*). Under the Copyright Act, 1911, there would seem to be no distinction between a letter and any other work, consequently the author or writer of the letter has the copyright. A mere authority to write a biography is not an authority to publish letters procured for the purpose, or any extracts therefrom, or paraphrases thereof, or to do more than use the information contained in the letters (*n*).

(*i*) Dodsley *v.* McFarquhar, Mor. Dict. of Dec., p. 8303, App. pt. 1.

(*k*) Burnett *v.* Chetwood, (1720) 2 Mer. 441 n.; Thompson *v.* Stanhope, (1774) Amb. 737.

(*l*) Constable & Co. *v.* Robinson's Trustees, Mor. Dict. of Dec., vol. 11, App. 12. As to the personal nature of agreements between authors and publishers, see *ante*, p. 297.

(*m*) Macmillan & Co. *v.* Dent, [1906] 1 Ch. 101, aff. [1907] 1 Ch. 107.

(*n*) Philip *v.* Pennell, [1907] 2 Ch. 577.

(7) *Patent Rights, Trade Marks and Designs.*

Inventor has no property in his invention.

An inventor has no property in his invention unless and until it is made the subject of a grant of letters patent, but he has such an interest in an invention, for which he intends to take out a patent, as to be able to make and enforce an agreement concerning it (*o*).

A patent right is not a chattel or analogous to a chattel. Letters patent do not confer on the patentee any right to use the invention; this he has equally with all the world apart from the grant; but the letters patent confer the right to exclude others from manufacturing in a particular way and using a particular invention (*p*).

True and first inventor or his representatives may obtain grant of letters patent.

Except in the case of convention applications under s. 91 of 7 Edw. VII. c. 29, the true and first inventor, or his legal representative, must be the grantee of letters patent for an invention, for, in virtue of the Statute of Monopolies and 7 Edw. VII. c. 29, s. 43, the Crown has otherwise no authority to make the grant. But a patent granted to several persons jointly is not invalid because some or one of them only are or is the true and first inventors or inventor, or legal representative of such. It is thus competent to an executor or administrator to apply for a patent for the invention of the deceased testator or intestate, and to give an interest in it from the beginning to a third party by joining him in the application for the grant (*q*).

Other persons may be joined in grant.

Effect of the Patents Act 1907.

By the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 17, the duration of every patent is limited to fourteen years, but under s. 18 the Court may extend the term for a further period not exceeding seven, or, in exceptional cases, fourteen years.

By s. 37, where a patent is granted to two or more persons jointly, unless otherwise specified in the patent, they are to be treated for the purpose of the devolution of the legal interest therein as joint tenants, and, if any such person

(*o*) Frost's Patent Law and Practice (4th ed.) vol. 2, p. 147.

(*p*) Edwards & Co. *v.* Picard, [1909] 2 K. B. 903.

(*q*) Frost's Patent Law and Practice (4th ed.), vol. 1, p. 13.

dies, his beneficial interest in the patent devolves on his personal representative as part of his personal estate.

By s. 43, if a person claiming to be inventor dies without making an application for a patent for the invention, application may be made by, and a patent for the invention granted to, his legal representative, on his making a declaration that he believes the deceased person he represents to be the true and first inventor of the invention.

By s. 71, where a person becomes entitled by assignment, transmission, or other operation of law to a patent, the comptroller shall, on request and on proof of title to his satisfaction, register him as the proprietor; and any equities in respect of the patent may be enforced in like manner as in respect of any other personal property.

Effect of registration of a trade mark.

A trade mark can only be registered in respect of particular goods or classes of goods (*r*), and when registered it can only be assigned and transmitted in connection with the goodwill of the business concerned in the goods for which it has been registered, and is determinable with that goodwill (*s*). It is the registration of a person as proprietor of a trade mark which gives the exclusive right to the use of it (*t*), and except in the case of a trade mark in use before the 13th August, 1875, and which has been refused registration under the Act of 1905, no person is entitled to institute any proceeding to prevent, or to recover damages for infringement of an unregistered trade mark (*a*).

Effect of registration of a trade design.

Copyright in a design applicable to any article of manufacture may be obtained by registration under the Patents and Designs Act, 1907, during five years from the date of registration, with power for the comptroller to extend the period for a second period of five years from the expiration of the original period, and for a third period of five years from the expiration of the second period (s. 53).

(*r*) Trade Marks Act, 1905 (5 Edw. VII. c. 15), s. 8.
(*s*) *Ibid.*, s. 22.
(*t*) *Ibid.*, s. 39.
(*a*) *Ibid.*, s. 42.

(8) *On Death of Corporation Sole.*

Choses in action of a corporation sole pass to his legal personal representative. Except by custom, charter, or statute.

In the case of a corporation sole, as a bishop, parson, vicar, a chose in action on his death will pass to his legal personal representative and not to his successor. But a chose in action may go in succession to a corporation sole by custom, *e.g.*, bonds taken by the Chamberlain of London for the benefit of the orphanage fund; also by charter, *e.g.*, penalties recovered by the President of the College of Physicians (*b*); also by statute, as in the case of the Public Trustee (*c*).

Sect. 2.—*Of Rights accrued after the Death of the Testator or Intestate.*

The character in which representative should sue.

Where the cause of action accrued in the lifetime of the deceased the action must be brought by his legal personal representative in his representative capacity (*d*). But where the cause of action accrued after the death of the deceased, his representative has in some cases an option either to sue in his representative capacity or in his individual capacity.

For damage to property representative may sue in his own name.

Inasmuch as the property of personal chattels draws to it the possession, so that the owner may bring either trespass or trover at his election against any stranger who takes them away, and since the executor or administrator is in point of law the owner of the goods which belonged to his testator or intestate, whether in actual possession of them or not before the tort committed, he may declare, as any other person may, upon his own property when wrongfully damaged by another (*e*).

Right to sue in representative character depends on whether money when recovered would be assets.

The right of the personal representative to sue in that character must depend on whether the money he sues for would be assets when recovered. The difficulties arise where the executor or administrator is also beneficially interested as legatee or next-of-kin, since, as soon as he has assented to

(*b*) Williams (10th ed.) 637.

(*c*) *Re* Leslie's Hassop Estates, [1911] 1 Ch. 611; and see also The Treasury Solicitor Act, 1876 (39 & 40 Vict. c. 18), s. 1.

(*d*) Williams (10th ed.) 1517.

(*e*) *Ibid.*, 659.

take, the benefit would be no longer assets ; and again where the question is in what character a business is being carried on by him (*f*).

Administrator *de bonis non* should sue in representative character.

Where a contract was entered into with the administrator, as administrator, and he dies, since the proceeds of the action on the contract when recovered would be assets of the original intestate the administrator *de bonis non* is the proper person to sue, and should declare as such, and any other declaration would be incorrect (*g*).

Where there are several representatives contract by one gives no right of action to all, although money when recovered would be assets.

Although an executor or administrator has the option to sue in his representative character on contracts made with himself, where the money when recovered would be assets of the testator or intestate, yet if there are two or more representatives a contract entered into by one of them alone (unless he contracted on account of himself and the others or generally on account of the estate) cannot be enforced by the others, notwithstanding that the money when recovered would be assets, since that circumstance cannot alter the contract itself (*h*).

Question as affecting right of set-off and counter-claim.

Whether a personal representative may sue or be sued in that character or not is important as affecting the right to set-off and counter-claim (*i*).

Money wrongfully paid away should be reclaimed in representative capacity.

When a personal representative discovers that he has in his representative character committed a devastavit by paying that which he ought not to have paid, he ought to sue in the same character to recover it again, since the money when recovered will continue assets, and if the action were brought in his individual character the demand might be subject to a set-off, or when recovered liable to his debts.

Ord. 18, r. 5.

Ord. 18, r. 5, of the R. S. C. provides that claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the

(*f*) Abbott *v.* Parfitt, (1871) L. R. 6 Q. B. 346, 350.

(*g*) Moseley *v.* Rendell, (1871) L. R. 6 Q. B. 338.

(*h*) Heath *v.* Chilton, (1844) 12 M. & W. 632.

(*i*) Clark *v.* Hougham, (1823) 2 B. & Cr. 149, 155.

estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator.

Ord. 3, r. 4, provides that if a person sues or is sued in a representative capacity the indorsement of the writ shall show in what capacity he sues or is sued. Ord. 3, r. 4.

In many cases an action on which the deceased himself could not have sued may accrue to the executor or administrator in his own time upon a contract made with the testator or intestate in his lifetime (*k*). Likewise a right to sue, which never existed in the testator or intestate, may accrue to the executor or administrator by remainder; as where a lease is made to B. for life, the remainder to his executors for years, or where a lease for years is bequeathed by Will to A. for life and afterwards to B. who dies before A., although B. never had the term in him, yet it shall devolve on his executors, who may maintain an action in respect of it (*l*). So a suit may accrue in the time of the executor or administrator by reason of a condition made to the deceased and not performed until after the death of the testator or intestate (*m*).

Right of action may accrue after death;

or in remainder;

or on performance of a condition after death.

Sect. 3.—*Of Contingent and Executory Interests.*

Contingent and executory interests, whether in real or personal estate, are transmissible to the representative of the party contingently entitled, though dying before the contingency upon which they depend takes effect (*n*). It would seem the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take (*o*).

A mere expectancy or possibility, a *spes successionis*, such as the expectant or possible interest of a person becoming the heir-at-law or next-of-kin of a person still living, not

Contingent and executory interests are transmissible to representatives;

unless being in existence when contingency happens is essential to description.

A mere expectancy or possibility is not transmissible;

(*k*) Williams (10th ed.) 666.
(*l*) *Ibid.*, 668.
(*m*) *Ibid.*
(*n*) *Ibid.*, 670.
(*o*) See per Kay, J., in *Re* Cresswell, (1883) 24 C. D. 102, 107.

but the benefit of an agreement relating thereto is transmissible.

being by English law a title to property (*p*), is not transmissible to his executor or administrator (*q*). But all future property, possibilities and expectancies are assignable in equity for value (*r*), and the benefit of such an assignment is transmissible to the executors or administrators of the assignee. To make such an assignment effective, notice of it must be given, as soon as the fund comes into existence, to the person having control of the fund (*s*).

(*p*) *Re* Parsons, (1890) 45 C. D. 51. Nor is it an "interest in expectancy" protected by s. 2 of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47): *Re* Green, [1911] 2 Ch. 275.

(*q*) Williams (10th ed.) 672 n. (*g*).

(*r*) Tailby *v.* Official Receiver, (1888) 13 App. Cas. 523, 543; and see *Re* Mudge, [1913] 2 Ch. 92.

(*s*) *Re* Dallas, [1904] 2 Ch. 385.

CHAPTER XX.

OF THE RIGHTS OF HUSBAND AND WIFE.

SECT. 1.—*At Common Law.*

(1) *As to leasehold interests of wife.*

Rights of husband at common law.

THE common law gave the husband a qualified interest in his wife's chattels real in possession during the coverture. The husband was possessed thereof in her right, and was entitled to receive the rents and profits during the coverture, with power during the coverture of disposing of the property otherwise than by his Will. If he disposed thereof by a complete act in his lifetime her right of survivorship was defeated, but if he left them *in statu quo*, and the wife survived him, she was entitled to them, to the exclusion of the husband's legal personal representative (*a*).

If husband survived his interest became complete *jure mariti*; and need not take out letters of administration.

If he survived his wife his interest became complete, and he became entitled *jure mariti* to all chattels real of the wife vested in possession during the coverture *jure uxoris* and undisposed of by him and left *in statu quo* during the coverture, and there was no need for him to take out letters of administration to his wife; and the rule was the same as to an equitable term (*b*).

A reversionary interest in leaseholds belonging to a wife was assignable by the husband, if it were of such a nature that it might by possibility vest in the wife in possession during the coverture. And even though it could not take effect in possession during the coverture, if the husband survived his wife, in order to entitle him to such an interest it was not necessary that he should take out administration to her (*c*).

(*a*) Williams (10th ed.) 523.

(*b*) *Ibid.*, 528; *Re* Bellamy, (1884) 25 C. D. 620, 623.

(*c*) *Re* Bellamy, *ubi sup.*, and cases cited in the judgment.

Will of husband cannot dispose of chattels real of wife against her surviving.

The Will of the husband cannot dispose of the chattels real of the wife against her surviving him ; for as that does not take effect till after his death, the law takes precedence, and vests the term in the wife immediately upon his decease (*d*).

Disposition of husband must effect complete alteration in nature of joint interest:

To defeat the wife's claim on her surviving her husband, the disposition by the husband in his lifetime of his wife's chattels real must be of a description to effect a complete alteration in the nature of the joint interest (*e*).

e.g., judgment in action for possession in his own name alone,

If husband and wife be ejected of a term which he enjoyed in her right, and he commences an action of ejectment in his own name, and obtains judgment, the recovery will change the wife's property in the term, and vest it in the husband (*f*).

award by arbitrator,

An award in favour of the husband by an arbitrator in a dispute between him and a third person is sufficient (*g*).

acceptance of a new lease.

So also the acceptance of a new lease by the husband, for, by operation of law, the old term is thereby surrendered (*g*).

Husband may make a partial disposition as by underlease reserving rent to himself ;

The husband may make a partial disposition of his wife's chattels real ; for instance, if the husband alone grants an underlease of a portion of a term belonging to his wife reserving rent, and dies, the reversion expectant on the underlease belongs to the surviving wife ; but, the underlease being in derogation of the wife's estate, the rent reserved is not incident to the reversion, but passes to the legal personal representative of the husband (*h*). Had both husband and wife joined in the lease, the rent would have been incident to the reversion and belonged to the wife (*i*).

but if both join in lease the rent is incident to the reversion.

Effect of mortgage by husband of his wife's chattels real.

So with regard to a mortgage by the husband of his wife's chattels real, unless his intention to defeat her right can be collected from the particular instrument of mortgage, the Court regards the instrument that nothing more was intended than that which was necessary to make the estate a security to the mortgagee for the money advanced ; and the

(*d*) Williams (10th ed.) 524.
(*e*) *Ibid.*
(*f*) *Ibid.*
(*g*) *Ibid.*, 525.
(*h*) *Ibid.*, 526; and see Preston's Abstracts of Title, vol. I. p. 344, and 1 Roper, Husband and Wife (2nd ed.) 174.
(*i*) Preston's Abstracts of Title, vol. I., p. 345.

mere circumstance that the proviso for redemption points, in terms, to a mode of conveyance not in conformity with the title, is generally not sufficient to induce the Court to depart from that presumption (*j*). But if in any case the husband, after the estate of the mortgagee has become absolute, pays the money, and takes an assignment to himself, the property will be altered, and the term will go to the executors of the husband to the exclusion of the wife (*k*).

Effect of wife's concurrence.

Where the concurrence of the wife is necessary, as in dealing with her freehold property, and she concurs with her husband in mortgaging her property, and it appears by the deed that the money was paid to the husband, the Court infers, subject to rebutting evidence, that the debt is the debt of the husband, and that the wife's property is a surety for it and therefore she is entitled to have her property exonerated by him from the charge (*l*).

Effect of husband's agreement for sale, charge, or underlease of his wife's chattels real.

It would seem that on the principle that that which for a valuable consideration is agreed to be done is considered in equity as actually performed, if the husband had agreed to dispose of his wife's chattels real, as by sale, charge, or underlease, such agreement would be enforced against the surviving wife (*m*), but in the case of the interest of the husband in right of his wife in a term of years being equitable, should it be necessary for the persons claiming in right of her husband to come into equity to enforce performance of the agreement, the person seeking equity must do equity, and the Court will recognise the wife's equity to a settlement (*n*).

(2) *As to choses in action of wife.*

Rights of husband at common law.

Apart from the Married Women's Property Acts, 1870 and 1882, the law is that choses in action which are given to the wife, either before or after marriage, survive to her after

(*j*) Clark *v.* Burgh, (1845) 2 Coll. 221; Pigott *v.* Pigott, (1867) L. R. 4 Eq. 549.

(*k*) Williams (10th ed.) 526.

(*l*) Hall *v.* Hall, [1911] 1 Ch. 487.

(*m*) Macqueen's Husband and Wife (4th ed.) 24.

(*n*) *Ibid.*

Effect of judgment recovered by husband in his own name.

the death of her husband, provided he has not reduced them into possession ; but as to those choses in action which come during the coverture, the husband may bring an action for them in his own name, and that recovering in his own name is equal to reducing them into possession (*o*).

Arrearages of rent.

If a husband be seised of a rent service, rent charge, or rent seck, in right of his wife, and the rent be in arrear during the coverture, and then the husband dies, the wife shall have the arrearage (*p*).

If the wife survive her husband rent in arrear reserved to them jointly on an underlease of the wife's property will at the death of the husband survive to the wife by virtue of the joint interest. But if she were not a party to the derivative lease, or if she were a party, and the rent was reserved to the husband alone, then, as well the arrears as the future rent will belong to the legal personal representatives of the husband (*q*).

Assignments by husband void as against wife's right of survivorship.

An assignment even for valuable consideration by the husband of a chose in action of his wife, as well present as reversionary, is void as against the wife's right by survivorship unless the fund is reduced into possession in the meantime (*r*). If the assignee during the life of the husband reduces the fund into possession the wife's right by survivorship will be barred (*s*).

What amounts to reduction into possession.

A mere intention by the husband to reduce the wife's choses in action into possession will be insufficient to defeat her right by survivorship. The acts to effect that purpose must be such as to change the property in them, or, in other words, must be something to divest the wife's right and to make that of her husband absolute, such as a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife,

(*o*) Williams (10th ed.) 641.
(*p*) *Ibid.*
(*q*) *Ibid.*
(*r*) Prole *v.* Soady, (1868) L. R. 3 Ch. 220; and see cases referred to in Williams (10th ed.) 645, n. (*y*), also Watson's Comp. of Equity (2nd ed.), p. 348.
(*s*) Allday *v.* Fletcher, (1857) 1 De G. & J. 82.

or receipt of the money, or a decree in equity for payment of the money to him or to be applied to his use (*t*).

Receipt by agent approved by husband and wife.

It was also held, prior to the Married Women's Property Act, 1882, that the receipt by an agent, approved by husband and wife, of money forming part of the estate of an intestate of which the wife was administratrix, the debts of the intestate having been paid and the shares of the next-of-kin being immediately receivable, amounted to a reduction into possession by the husband of the wife's distributive share of the money (*u*).

Receipt by husband must be in that character; his receipt as executor or trustee merely is insufficient.

The husband's receipt or possession of his wife's choses in action must, however, be in the character of husband in order to defeat his wife's title by survivorship (*x*). Thus where a trustee and executor (who alone proved) married one of the residuary legatees named in the Will, his possession of the testator's personal estate was considered as that of trustee and executor only, and not as husband, and therefore his wife's share of the residue could not be deemed sufficiently reduced into possession so as to prevent its surviving to her upon his death (*y*). So a transfer of stock to the husband merely as a trustee cannot be considered as a reduction into possession so as to entitle his representatives (*z*).

Husband may acquire title by contract previously to marriage.

The husband may entitle himself to all his intended wife's personal estate, whether in possession or in action, or which she may afterwards acquire, by becoming a purchaser of it by agreement previously to and in contemplation of the marriage (*a*).

If husband survive he will be entitled on taking administration to his wife.

If the husband survive his wife, on taking out letters of administration to her he will be entitled, as such administrator, to all her personal estate which continued in action or unrecovered at her death (*b*).

If the husband should die before he has obtained a grant of the administration, or, after having taken out letters,

(*t*) Williams (10th ed.) 646.
(*u*) *Re* Barber, (1879) 11 C. D. 442.
(*x*) Williams (10th ed.) 651.
(*y*) Baker *v.* Hall, (1806) 12 Ves. 497.
(*z*) Wall *v.* Tomlinson, (1810) 16 Ves. 413.
(*a*) Williams (10th ed.) 653.
(*b*) *Ibid.*, 654.

before all her property in action has been reduced into possession, such property cannot be recovered by his representatives, but administration must be taken out to the wife for that purpose, either generally or *de bonis non*, as the case may require. Such administrator, however, will be considered in equity as a trustee of what he receives for the personal representatives of the husband (*c*).

(3) *As to chattels personal in possession.*

Rights of husband at common law.

At law the marriage is an absolute gift to the husband of all chattels personal in possession of the wife in her own right, whether the husband survive the wife or not (*d*) ; and

In equity.

there is no distinction in this respect between property to which the wife is entitled in equity and property to which she is entitled at law, except that in the former case, it being subject to the control of the Court of Equity, the wife may assert her equity for a settlement, but this equity does not depend upon any right of property in her. It arises upon the husband's legal right to present possession ; the principle has no application to a remainder or reversion until it falls into possession (*e*).

Extent of equity to a settlement.

The wife's equity to a settlement extends to all unsettled property to which she is entitled, and the amount to be settled is discretionary, depending on the particular circumstances of each case, and under special circumstances she may be entitled to have the whole fund settled (*f*). Although in making a provision for the wife the Court always includes the children of the marriage, yet, the right being personal to herself, it cannot be enforced by her children if before decree she should waive her right or die (*g*).

(*c*) Williams (10th ed.) 655.

(*d*) Co. Lit. 351 b.

(*e*) Osborn *v.* Morgan, (1851) 9 Hare, 432; and see Knight *v.* Knight, (1874) L. R. 18 Eq. 487, 490.

(*f*) Spirett *v.* Willows, (1866) L. R. 1 Ch. 520; *Re* Suggitt's Trusts, (1867) L. R. 3 Ch. 215 ; Roberts *v.* Cooper, [1891] 2 Ch. 335.

(*g*) For further information on this subject see Williams (10th ed.) 1155 *et seq.*

(4) *As to pin-money.*

Nature of pin-money.

Those gifts of money by the husband to the wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin-money, will be good in equity as against the husband and all volunteer claimants through him (*h*).

Savings out of housekeeping.

So where on the death of the husband there is no deficiency of assets to pay debts the wife will not be liable to account for sums saved out of housekeeping (*i*), and will be allowed to retain savings arising out of trivial matters connected with the farm, as where she has been allowed to dispose and make a profit out of butter, eggs, poultry, pigs, fruits, &c. (*k*).

Savings not exempted from husband's debts.

But savings by the wife out of her pin-money, or other allowance made by the husband, are not exempted from the husband's debts in the event of deficiency of assets (*l*).

Arrears of pin-money.

It would seem that the wife cannot claim against the husband's representatives more than one year's arrears of pin-money, and if pin-money be in arrear, and the wife dies, her representatives cannot sustain any claim to it whatever (*m*). But the principle on which this rule was established is that while the estate is enjoyed by the husband, and the wife is maintained by him, it will be presumed that she has consented to forgo her claim against her husband or his estate. So that where pin-money is secured on the husband's property, and either the wife has parted with her right to the personal enjoyment of the pin-money, or the husband has been deprived of the enjoyment of the estate on which the pin-money is charged, the principle does not apply, as, for instance, in a case where the wife had assigned her pin-money for valuable consideration, and the estate chargeable was not enjoyed by the husband, but was under

(*h*) Williams (10th ed.) 582.

(*i*) Mangey *v.* Hungerford, (1734) 2 Eq. Cas. Abr. 156 in marg.

(*k*) Slanning *v.* Style, (1734) 3 P. Wms. 334, 337.

(*l*) Williams (10th ed.) 583.

(*m*) Howard *v.* Digby, (1834) 2 Cl. & F. 634; and see Williams (10th ed.) 583, 584.

a receiver appointed by the Court, it was held that the assignee was entitled to recover the entire amount of the arrears (*n*).

(5) *As to paraphernalia.*

Nature of paraphernalia.

Paraphernalia are apparel and ornaments given by the husband to the wife suitable to his rank and degree (*o*).

The gift of jewels and ornaments as paraphernalia is implied by the husband allowing his wife to wear them (*p*), and that they should be in the custody of the husband at his death will make no difference (*q*).

Family jewels.

Old family jewels, which have been handed down from father to son, cannot be claimed as paraphernalia, notwithstanding they may have been worn by the wife at Court and elsewhere (*r*).

Power of disposition.

There is a distinction between gifts of the husband to the wife for her separate use and gifts by him to her as paraphernalia, for she may dispose absolutely of the things given to her for her separate use, but where the husband expressly gives anything to her to be worn as ornaments of her person only they are to be considered merely as paraphernalia and she cannot dispose of them by gift or Will during his life, and the husband may dispose of them in his lifetime (*s*), although he cannot dispose of them by Will during her life (*t*).

Liability for husband's debts.

If there are not assets of the husband at his death available for payment of his debts *bona* paraphernalia are liable to his creditors, and it makes no difference that contingent assets afterwards fall in (*u*).

It would seem that the widow is entitled to the extent of her paraphernalia to have her husband's assets real and

(*n*) Tuffnell *v.* O'Donoghue, [1897] 1 I. R. 360.
(*o*) Williams (10th ed.) 584.
(*p*) *Ibid.*, 586.
(*q*) Northey *v.* Northey, (1740) 2 Atk. 77, 79.
(*r*) Jervoise *v.* Jervoise, (1853) 17 Beav. 566.
(*s*) Graham *v.* Londonderry, (1746) 3 Atk. 393; and see Williams (10th ed.) 586.
(*t*) Northey *v.* Northey, *ubi sup.*
(*u*) Williams (10th ed.) 587.

personal marshalled in her favour similarly to a simple contract creditor (*x*).

If in pledge by husband at his death wife entitled to have them redeemed.

Although the husband may alien the wife's paraphernalia in his lifetime, yet if the alienation is not absolute, but as a pledge or security for money, the wife surviving him will be entitled to have them redeemed by his executors out of his personal estate, if sufficient for that purpose after payment of his debts (*y*).

Right to paraphernalia may be barred by agreement or election.

The widow may bar her right to paraphernalia by agreement with her husband, or by electing to take them with other benefits by way of legacy under his Will restricted to her life interest (*z*).

Effect of Married Women's Property Act, 1882.

It would seem that the Married Women's Property Act, 1882, has rendered practically obsolete the general law as to gifts of paraphernalia ; since the widow's right arose solely by way of exception out of the generality of the husband's common law right to all her property : *cessante ratione cessat et ipsa lex* (*a*).

(6) *As to property of which wife is joint tenant.*

Effect of marriage as to severance of joint tenancy.

The effect of marriage on particular property in which a woman has an interest as joint tenant depends on whether the marriage divests the property from the wife and vests it in the husband. If the effect is to vest the property in the husband then there will be a severance of the joint tenancy, but if it does not vest the property in the husband then there is no severance. Where some *novus actus interveniens* on the part of the husband is required, *e.g.*, an assignment of the wife's chattels real or reduction into possession of her choses in action, in neither of these cases does marriage operate as a severance (*b*). It follows that in cases where there has been no severance the wife's interest does not survive to the husband.

(*x*) Williams (10th ed.) 588 ; see *post*, p. 568.

(*y*) *Ibid.*, 589 ; see Graham *v.* Londonderry, (1746) 3 Atk. 393.

(*z*) *Ibid.*

(*a*) Masson Templier & Co. *v.* De Fries, [1909] 2 K. B. 831, 836, per Farwell, L.J. ; Tasker *v.* Tasker, [1895] P. 1, disapproved.

(*b*) *Re* Butler's Trusts, (1888) 38 C. D. 286.

Sect. 2.—*Equitable Doctrine of Separate Use.*

Nature of equitable doctrine of separate use.

By the introduction of the equitable doctrine of separate use a married woman was considered as capable of possessing property to her own use, independently of her husband ; such property is called her separate estate, and in respect of it, if unaccompanied by any restraint on anticipation, she is considered as a *feme sole*, enjoying and capable of exercising her rights as such.

How separate property may be acquired.

Such property may be acquired either by contract with the husband before the marriage or by gift from him, or from any stranger, wholly independent of such contract. So far as his legal rights as husband may interfere, the Court will treat him as a trustee (*c*).

So also a woman might prior to marriage, in cases clear of fraud on the marital rights, assign her property to trustees for her separate use, which would have effect on her marriage (*d*).

Gifts by husband to wife.

Although at law gifts from the husband to the wife were void, yet in equity a husband might become a trustee for his wife ; and if by clear and irrevocable acts he makes himself such trustee the gift will be conclusive (*e*). But if the husband makes an imperfect gift to the wife the Court will not in the case of a husband and wife any more than in any other case hold that the intending donor is a trustee for the wife (*f*). Such a gift, however, may be perfected by the wife becoming executor of her husband (*g*).

Purchase by husband in joint names of himself and his wife.

Where a husband purchases real or personal property in the name of his wife, or in their joint names, it will be presumed to have been intended as an advancement and provision for the wife, and on surviving her husband she will be entitled (*h*). The Court makes the presumption from the

(*c*) Per Ld. Langdale in Tullett *v.* Armstrong, (1839) 1 Beav. 1, 21.

(*d*) Strathmore *v.* Bowes, (1788) 2 B. C. C. 345.

(*e*) Mews *v.* Mews, (1852) 15 Beav. 529, 533 ; and see Williams (10th ed.) 579.

(*f*) *Re* Breton, (1881) 17 C. D. 416 ; and see Williams (10th ed.) 581, n. (*p*).

(*g*) *Re* Stewart, [1908] 2 Ch. 251 ; see *post*, p. 518.

(*h*) Williams (10th ed.) 580 ; and see *Re* Young, (1885) 28 C. D. 705.

relation of the parties at the time the purchase or gift was made, and there is no implied condition that the marriage would continue as a valid marriage and is not affected by the marriage being dissolved (*i*) or being declared null and void (*k*). But such presumption may be rebutted, and the surrounding circumstances may be taken into consideration so as to say it is a trust for the purchaser and not a gift (*l*).

Right of husband *jure mariti* should he survive.

On the death of the wife the quality of separate property ceases, and should the husband survive his wife, any such property undisposed of by the wife, either during her life or by Will, and in her actual possession at her death, belongs to the husband *jure mariti*, and he need not become her administrator to entitle himself to it (*m*). But it has been held in a case relating to leasehold property to which a married woman was entitled in possession for her separate use—and there can be no distinction in respect of other personal property in possession settled for her separate use—that although there is no necessity for the husband surviving to take out letters of administration, but the property passes to him *jure mariti*, yet that by reason of s. 23 of the Married Women's Property Act, 1882, he is subject to the same liabilities as she would be if living (*n*).

Sect. 3.—*The Married Women's Property Acts*, 1870, 1882.

Woman married after August 9, 1870.

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 7, a woman married after the 9th August, 1870, becoming entitled during her marriage to any personal property as next-of-kin of an intestate or to any sum not exceeding £200 under any deed or Will, such property, subject and without prejudice to the trusts of any settlement affecting the same, belonged to her for her separate use. This

(*i*) Thornley *v.* Thornley, [1893] 2 Ch. 229.

(*k*) Dunbar *v.* Dunbar, [1909] 2 Ch. 639.

(*l*) Marshal *v.* Crutwell, (1875) L. R. 20 Eq. 328.

(*m*) Molony *v.* Kennedy, (1839) 10 Sim. 254 ; and see Williams (10th ed.) 573, n. (*m*).

(*n*) Surman *v.* Wharton, [1891] 1 Q. B. 491 ; *Re* Evans, [1910] 1 I. R. 95.

Act is repealed by s. 22 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), saving any act done or right acquired while in force, and by the later Act (s. 2) every woman married after the 1st January, 1883, shall be entitled to hold as her separate property, and to dispose of as a *feme sole*, all real and personal property belonging to her at the time of marriage or acquired by or devolving upon her after marriage, and (s. 5) every woman married before the 1st January, 1883, shall be entitled to hold, and to dispose of as aforesaid, as her separate property, all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after that date (*o*). Sect. 19 provides that the Act shall not interfere with or affect any settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or render inoperative any restriction against anticipation. But by the Married Women's Property Act, 1907 (*p*), any such settlement shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age; but if she died an infant any covenant or disposition by her husband contained in the settlement shall bind or pass any interest in any property of hers to which he may become entitled on her death, and which he could have bound or disposed of if the Act had not been passed.

Woman married after January 1, 1883.

Woman married before January 1, 1883.

Saving as to settlements.

If the husband survives the wife that to which at her death she is entitled under the Act of 1882 as separate property belongs to the husband, but not having taken any legal interest therein during her life he must obtain a grant of administration (*q*).

Husband surviving must obtain grant of administration to wife's separate property under Act of 1882.

Savings and investments by a married woman of the income of separate property are also separate property (*r*).

Investments of savings also separate property.

(*o*) This refers to the date when the title was acquired, and not when the property falls into possession: Reid *v.* Reid, (1886) 31 C. D. 402.

(*p*) 7 Edw. VII. c. 18, s. 2.

(*q*) Williams (10th ed.) 521, n. (*y*), and 573, n. (*m*), *ante*, p. 110.

(*r*) Williams (10th ed.) 47, 578; and see Finlay *v.* Darling, [1897] 1 Ch. 719; *Re* Clutterbuck's Settlement, [1905] 1 Ch. 200.

CHAPTER XXI.

OF "DONATIO MORTIS CAUSÂ."

THERE are three essentials to constitute a *donatio mortis causâ*. (1) The gift must be with a view to the donor's death. (2) It must be conditioned to take effect only on the death of the donor by his existing disorder. (3) There must be a delivery of the subject of the donation (*a*). Essentials to a *donatio mortis causâ*.

(1) A *donatio mortis causâ* can only be established by an expressed intention or by a necessary implication that the gift should not take effect except in the event of the death of the donor (*b*). (1) Contemplation of death.

Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death (*c*).

A gift made in contemplation of suicide is not a valid *donatio mortis causâ* (*d*).

(2) The condition that if the donor live the thing shall be returned to him need not be expressly declared; it will be inferred if the gift is made in expectation of death (*e*). (2) Condition that gift shall be returned if death does not follow.

If the donor survive the illness during which the transfer or delivery was made, the gift cannot operate as a *donatio mortis causâ*, and the donee will be considered as a trustee for the donor (*f*).

If it appear from the circumstances of the transaction that the donor intended to make an immediate and irrevocable Intention to make an immediate

(*a*) Williams (10th ed.) 591; and see Cain *v.* Moon, [1896] 2 Q. B. 283, 286.

(*b*) Tate *v.* Leithead, (1854) Kay, 658, 662.

(*c*) Williams (10th ed.) 591; 1 Rop. Leg. (4th ed.) 4.

(*d*) Agnew *v.* Belfast Banking Co., [1896] 2 Ir. R. 204.

(*e*) Gardman *v.* Parker, (1818) 3 Madd. 184.

(*f*) Staniland *v.* Willott, (1850) 3 M. & G. 664.

and irrevocable gift will negative *donatio mortis causâ*.

gift, that would destroy the title of the party who claims the property as a *donatio mortis causâ ;* and the Court will not aid a volunteer to carry into effect an imperfect gift by treating it as a *donatio mortis causâ* (*g*).

(3) Actual delivery.

(3) To substantiate the gift there must be an actual tradition or delivery of the thing to the donee himself, or to some one else for the donee's use by the donor himself or by his order (*h*).

What is sufficient delivery.

An antecedent delivery to the donee, though made *alio intuitu*, is, however, sufficient (*i*).

The deceased must not only part with the possession, but also with the dominion over whatever is the subject of the gift. So that where the deceased delivered over a box containing money, telling the donee it was entirely at her disposal after he was gone, but that he should want it every three months while he lived, and retained control of the key, it was held there was no *donatio mortis causâ* (*k*).

The gift, however, may be coupled with a trust or charged with the performance of some particular purpose, for instance the payment of the expenses of the deceased's funeral (*l*).

Where the nature of the thing will not admit of corporeal delivery it would seem delivery of the means of coming at the possession or making use of the thing given will be sufficient, for instance the delivery of the key of a trunk or of a warehouse in which goods are deposited (*m*).

What may be the subject of *donatio mortis causâ :*

negotiable instruments passing by delivery ;

unendorsed negotiable instruments payable to order ;

A negotiable instrument which requires nothing more than delivery to pass to the donee the money secured by it may be the subject of a *donatio mortis causâ* (*n*) ; so also an unendorsed negotiable instrument payable to the donor or order may be the subject of a *donatio mortis*

(*g*) Edwards *v.* Jones, (1836) 1 My. & C. 226.

(*h*) Williams (10th ed.) 593.

(*i*) Cain *v.* Moon, [1896] 2 Q. B. 283.

(*k*) Reddell *v.* Dobree, (1839) 10 Sim. 244 ; Solicitor to the Treasury *v.* Lewis, [1900] 2 Ch. 812.

(*l*) Hills *v.* Hills, (1841) 8 M. & W. 401 ; and see Solicitor to the Treasury *v.* Lewis, *ubi sup.*

(*m*) Williams (10th ed.) 594 ; Mustapha *v.* Wedlake, [1891] W. N. 201.

(*n*) Williams (10th ed.) 595.

causâ (*o*); and a cheque payable to the donor or order stands on the same footing as a promissory note or bill of exchange (*p*).

endorsed cheques payable to donor or order;

In these cases where the property is not transferred at law, the delivery of the instrument entitles the donee to the assistance of a Court of Equity to make the gift complete in accordance with the principles laid down in the decision of Lord Eldon in *Duffield* v. *Elwes* (*q*), where he held that a mortgage can be the subject of a *donatio mortis causâ* by delivery of the mortgage deeds, since the property in the deeds, and the right to recover the money secured by them, passed by the delivery, followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee to make the gift effectual, and where necessary the personal representatives must lend their names to enable the donee to recover the money, he having an equitable title to it (*r*).

mortgage deeds;

The same principle applies to delivery of a bond (*s*), a policy of insurance (*t*), a banker's deposit note (*u*), a Post Office Savings Bank deposit book (*x*)

bond; policy of assurance; deposit note savings bank book.

Where no property legal or equitable is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis causâ* (*y*), for instance delivery of receipts for South Sea annuities (*z*), certificates of railway stock (*a*), the certificate of stock placed on the Savings Bank Investment Account and credited to the depositor (*b*), or certificates of building society shares (*c*).

No valid *donatio mortis causâ* where delivery of subject passes no property legal or equitable.

A promissory note or a cheque being for the unconditional payment of money, has not that reference to the death of the donor which is essential to constitute a valid *donatio*

Promissory note or cheque of donor.

(*o*) *Re* Mead, (1880) 15 C. D. 651.
(*p*) Clement *v.* Cheesman, (1884) 27 C. D. 631.
(*q*) (1827) 1 Bligh, N. S. 497.
(*r*) See Williams (10th ed.) 596, and *Re* Dillon, (1890) 44 C. D. 76, 82.
(*s*) Gardman *v.* Parker, *ubi sup.*
(*t*) Witt *v.* Amies, (1864) 33 Beav. 619.
(*u*) *Re* Dillon, *ubi sup.*
(*x*) *Re* Weston, [1902] 1 Ch. 680; *Re* Andrews, [1902] 2 Ch. 394.
(*y*) Williams (10th ed.) 598.
(*z*) Ward *v.* Turner, (1752) 2 Ves. Sen. 431.
(*a*) Moore *v.* Moore, (1874) L. R. 18 Eq. 474.
(*b*) *Re* Andrews, *ubi sup.*
(*c*) *Re* Weston, *ubi sup.*

mortis causâ, and therefore cannot operate as such in favour of the payee (*d*).

Where the cheque is in the lifetime of the donor negotiated or paid away by the donee for valuable consideration (*e*), or where the money is received immediately after the death of the testator before the banker is apprised of it (*f*), the gift has been validated, but rather as a mere donation than as a *donatio mortis causâ* (*g*).

Difference between *donatio mortis causâ* and a legacy.

A *donatio mortis causâ* differs from a legacy in these respects :

(1) Probate of it is unnecessary, for such a gift takes effect from delivery, so the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act.

(2) For the same reason no assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee (*h*).

Resemblance between *donatio mortis causâ* and a legacy.

A *donatio mortis causâ* differs from a gift *inter vivos* in these respects, in which it resembles a legacy (*i*) :

(1) It is ambulatory, incomplete, and revocable during the testator's life. The revocation may either be effected by the recovery of the donor from his disorder, or by resumption of the possession of the subject. But he cannot revoke the donation by a subsequent Will, for, on the death of the donor, the title of the donee becomes by relation complete and absolute from the time of delivery. It may, however, be satisfied by a legacy given to the donee, but the mere fact of a legacy being given of an amount equal to a previous *donatio mortis causâ* is not in itself a revocation of the donation (*k*).

(2) It is liable to the duties imposed on legacies by the

(*d*) Tate *v.* Hilbert, (1793) 2 Ves. 101 ; Hewitt *v.* Kaye, (1868) L. R. 6 Eq. 198 ; *Re* Beaks' Estate, (1872) L. R. 13 Eq. 489 ; *Re* Mead, (1880) 15 C. D. 651 ; *Re* Beaumont, [1902] 1 Ch. 889.

(*e*) Rolls *v.* Pearce, (1877) 5 C. D. 730.

(*f*) Tate *v.* Hilbert, *ubi sup.*

(*g*) Williams (10th ed.) 599, n. (*y*).

(*h*) *Ibid.*, 599.

(*i*) *Ibid.*, 600.

(*k*) Hudson *v.* Spencer, [1910] 2 Ch. 285.

express provisions of the statute 8 & 9 Vict. c. 76, s. 4, and to estate duty by s. 2 of the Finance Act, 1894.

(3) It is liable to the debts of the testator upon deficiency of assets (*l*).

A *donatio mortis causâ* will be established solely on the evidence of the donee, if such evidence is considered trustworthy (*m*).

Evidence to establish *donatio mortis causâ*.

(*l*) Tate *v.* Leithead, (1854) Kay, 658, 659.

(*m*) *Re* Farman, (1888) 57 L. J. Ch. 637; *Re* Dillon, (1890) 44 C. D. 76, 80; *Re* Weston, [1902] 1 Ch. 680, 684.

CHAPTER XXII.

OF THE FUNERAL, COLLECTING THE EFFECTS, AND TESTAMENTARY EXPENSES.

SECT. 1.—*Of the Funeral.*

Disposal of corpse.

THERE is no property in a dead body, and a person cannot dispose of his body by Will, but after his death his executors have a right to the custody and possession of the body until it is properly buried (*a*).

Obligation of parent to provide burial.

It was stated by Lord Campbell, C.J., in *Reg.* v. *Vann* (*b*), that there is no doubt that if a parent has the means of providing Christian burial for his child he is bound to do so ; but it was held that if he has not the means, though the body remains unburied and becomes a nuisance to the neighbourhood, he is not indictable for the nuisance, notwithstanding he could have obtained money for the burial expenses by way of loan from the poor law authorities of the parish, for he is not bound to incur a debt. It would seem that in such cases, whether the deceased was residing with the parent or emancipated from his parent's roof, the duty of burial properly devolves upon the parish officers under 7 & 8 Vict. c. 10, s. 31 (*c*). And in *Clark* v. *The London General Omnibus Co., Ltd.* (*d*), Farwell, L.J., intimated that he was not at all satisfied that the father is under an actual legal liability, as distinguished from a moral duty, to go to the expense of the burial of his child, even in the case of a child twelve years of age living with her parents.

Obligation of parish officers.

Obligation of husband.

There would seem, however, to be a legal liability upon a husband to bury his wife ; and a volunteer, employing and

(*a*) Williams *v.* Williams, (1882) 20 C. D. 659.

(*b*) (1851) 21 L. J. M. C. 39.

(*c*) See observations in Dalton *v.* S. E. Railway Co., (1858) 4 C. B. N. S. 296.

(*d*) [1906] 2 K. B. 648, 663.

paying an undertaker to conduct the funeral, is entitled to recover the expense so incurred from the husband (*e*).

Removal of body once buried.

When the body is buried in consecrated ground it remains under the protection of the Ecclesiastical Court of the diocese, and cannot be removed from the grave or vault, or mausoleum in which it has been placed, except under a faculty granted by an Ecclesiastical Court, and then only to another grave or vault in consecrated ground, and the Court would not be justified in granting a faculty for enabling remains to be removed after burial for cremation (*f*).

Cremation.

When burial in consecrated ground and cremation are both desired, cremation should precede and not follow burial. The Burial Service does not contemplate cremation. But where a body has been consumed in a fire, it has been customary to collect the ashes and to bury them in a churchyard, accompanied with the use of the Order for the Burial of the Dead, and there does not appear to be any legal objection to the same course being followed where there has been a previous cremation in pursuance of directions left by the deceased (*g*). The body of every person dying in this country, with certain exceptions, is entitled to Christian burial, and where a body has been buried in unconsecrated ground the Home Secretary will, under s. 25 of 20 & 21 Vict. c. 81, grant licence, on a proper application, for the removal of the body from the grave in which it is interred for the purpose of burying it in approved consecrated ground, but no licence would be given to remove the body for the purpose of cremation (*h*).

When cremation may be a misdemeanor.

To burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanor so to dispose of the body as to prevent the coroner from holding the inquest (*i*).

(*e*) Ambrose *v.* Kerrison, (1851) 20 L. J. C. P. 135.

(*f*) *Re* Dixon, [1892] P. 386.

(*g*) *Ibid.*

(*h*) Williams *v.* Williams, (1882) 20 C. D. 659.

(*i*) Reg. *v.* Price, (1884) 12 Q. B. D. 247.

Inquests.

The holding of inquests is regulated by the Coroners Act, 1887 (50 & 51 Vict. c. 71), and the expenses are paid by the local authority.

In absence of directions body should be buried not cremated.

If the deceased has left directions as to the disposal of his body, it is the duty of his personal representative to give effect to his wishes. But if the deceased has left no testamentary or clear directions as to his body, it is entitled to Christian burial, and the executor would not be warranted, to gratify his own fancy, without the deceased's sanction, in cremating the body of his testator, and so depriving it of being buried in the state and condition contemplated by this rule of law (*k*).

Anatomy Act, 1832, permits anatomical examination subject to certain restrictions.

By s. 7 of 2 & 3 Will. IV. c. 75 (Anatomy Act, 1832), an executor or other party having lawful possession of the body of a deceased person, and not being an undertaker, may permit the body to undergo anatomical examination, unless the deceased shall have expressed a contrary desire, or unless the surviving husband, or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.

Sect. 8 makes provision for carrying into effect any direction by the deceased for anatomical examination, unless the deceased's surviving husband, or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.

Funeral expenses.

Funeral expenses according to the degree and quality of the deceased are to be allowed of the goods of the deceased before any debt or duty whatsoever (*l*). And under s. 7 of the Finance Act, 1894, in determining the value of an estate for the purpose of estate duty, allowance is to be made for reasonable funeral expenses.

Liability of personal representative.

With respect to the liability of an executor or administrator to the expenses of the funeral of the deceased, it appears to be clear that if an executor or administrator gives

(*k*) Williams (10th ed.) 736.
(*l*) 3 Inst. 202; and see Williams (10th ed.) 737.

orders for the funeral, or ratifies or adopts the acts of another party who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses. And notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained, yet it would seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given, for the funeral of the deceased he will be thereby bound, after he has become administrator, to satisfy the charges incurred under such orders (*m*).

It seems now established, that, in the absence of evidence to charge any other individual, an executor with assets is answerable, in point of law, without any express contract, for the funeral expenses of his testator, suitable to his degree (*n*).

Right of stranger giving order and paying for funeral.

If a person, other than the executor, gives the order for the funeral and pays for it, he may have an action against the executor for so much of the cost as an executor might reasonably pay (*o*), unless perhaps it could be shown that he intended the payment as an act of bounty (*p*).

Right of husband against deceased wife's assets.

The law casts upon a husband the duty of burying his wife, but he is entitled to retain the sums expended on her funeral out of her estate as against her creditors (*q*).

Reasonable expenses allowed.

The rule appears to be, that the executor is entitled to be allowed reasonable expenses, according to the testator's condition in life. The amount must necessarily vary according to the circumstances of each case (*r*). As against creditors no more will be allowed for the funeral than is necessary, regard being had to the position in life of the deceased (*s*). But where the estate is solvent the inquiry would seem to be whether the sum expended exceeds what is usual at the

(*m*) Williams (10th ed.) 1426.

(*n*) *Ibid.*, 1427; and see Sharp *v.* Lush, (1879) 10 C. D. 468, 472.

(*o*) Green *v.* Salmon, (1838) 8 A. & E. 348.

(*p*) Coleby *v.* Coleby, (1866) 12 Jur. (N. S.) 496.

(*q*) *Re* M'Myn, (1886) 33 C. D. 575.

(*r*) See Williams (10th ed.) 737.

(*s*) Hancock *v.* Podmore, (1830) 1 B. & Ad. 260.

funerals of persons of the same rank and fortune as the deceased (*t*).

Mourning for widow and family not allowed.

Mourning furnished to the widow and family of the deceased is not a funeral expense such as can be claimed against the estate (*u*).

Cost of tombstone.

The cost of a tombstone will not be allowed as against creditors, or as against beneficiaries without their consent in the absence of any testamentary direction (*x*). If a testator has directed or bequeathed a sum certain, or a sum capable of being ascertained, to be applied in the erection of a tombstone or monument to his memory, either in a church, or on consecrated or unconsecrated ground, if the executors insist upon the trust being executed it would seem the Court is bound to see it carried out, although there may be no one able to compel the executors to carry it out (*y*). The same would seem to apply to a direction to expend a sum of money in repairing a tombstone or vault (*z*).

Sect. 2.—*Of Collecting the Effects.*

As soon as possible after the death, the executor, or the person entitled to and intending to apply for grant of letters of administration, should ascertain the particulars of the estate of the deceased with a view to the preparation of the Inland Revenue affidavit, which must be delivered before grant of probate or letters of administration (*a*), and collecting, getting in and preserving the effects.

As to inventories.

The repealed (*b*) statutes of 21 Hen. VIII. c. 5, and 22 & 23 Car. II. c. 10, provided for the making of inventories by executors and administrators of the goods and chattels of the

(*t*) Mullick *v.* Mullick, (1829) 1 Knapp, 245.

(*u*) Johnson *v.* Baker, (1825) 2 C. & P. 207.

(*x*) Bridge *v.* Brown, (1843) 2 Y. & Coll. C. C. 181, 185, 192.

(*y*) Trimmer *v.* Danby, (1856) 25 L. J. Ch. 424, 427; *Re* Dean, (1889) 41 C. D. 552, 557.

(*z*) Lloyd *v.* Lloyd, (1852) 2 Sim. (N. S.) 255, 264; *Re* Dean, *ubi sup.*; and see *post*, p. 460.

(*a*) See *ante*, p. 185.

(*b*) Repealed by 20 & 21 Vict. c. 77, s. 80; and see *ante*, p. 151, as to the administration bond required relating to collecting, getting in and administering the personal estate.

deceased. But the bond given under the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81, is conditioned to make the inventory when called on, and to exhibit the same whenever required by law so to do (*c*).

Modern practice.

According to the modern practice, neither the executor nor administrator exhibits any inventory whatsoever unless required so to do by summons at the instance of a party interested. Having regard, however, to the form of affidavit for Inland Revenue, an application for an order to exhibit an inventory is now very seldom made, but since the affidavit is filed in the Inland Revenue Office and not in the Probate Division, and is not accessible to everybody, it may in some cases still be convenient to apply to the registrar of the Probate Division for an inventory to be exhibited (*d*).

Declarations of personal estate.

In certain cases on the grant of letters of administration a declaration of the personal estate and effects of the deceased is required to be filed in the registry (*e*).

Appointment of administrator *pendente lite* or *ad colligenda bona*.

Should any contest arise in the Probate Division as to the validity of the Will or as to the person entitled to the grant of letters of administration the Court will appoint an administrator *pendente lite* for the purpose of taking possession of the deceased's property, and to bring actions, or make demands, and pay debts; and without any contest the Court may grant administration *ad colligenda bona* to a stranger where the necessity of the case requires it (*f*).

Appointment of receiver.

So also before grant of probate or letters of administration, where no suit is pending in the Probate Division, and after grant, in proceedings for administration, the Chancery Division will, in a proper case, appoint a receiver of the assets (*g*).

The liability of an executor or administrator for neglect in collecting and getting in the assets is considered later (*h*).

(*c*) See Tr. & Coo. P. P. (14th ed.), p. 912, Form 282.
(*d*) See Williams (10th ed.) 741 *et seq.*; Tr. & Coo. P. P. (14th ed.) 209.
(*e*) See P. R. 1862, r. 42, *ante*, p. 154.
(*f*) *Ante*, pp. 141, 144.
(*g*) *Ante*, p. 143.
(*h*) *Post*, p. 655.

SECT. 3.—*Of Administration Expenses.*

Administration expenses are a first charge on the assets.

The expenses in administering the estate are a first charge, whether administered in or out of Court (*i*).

What are administration expenses.

Executorship expenses, testamentary expenses, and administration expenses are synonymous expressions, and mean expenses incident to the proper performance of the duty of the executor or administrator. The word "testamentary" has ceased to have its purely etymological meaning. It applies equally to the case where there is no testament, and the estate is being administered according to the law of the land (*k*). It is immaterial whether a testator does or does not direct his testamentary expenses to be paid out of his general personal estate, as such a direction merely expresses what the law implies (*l*).

Administration expenses include :—

Funeral expenses.

(1) The funeral expenses (*m*), and these are to be allowed before any debt or duty whatsoever (*n*).

Probate or estate duty.

(2) Formerly probate duty and now the estate duty on personalty, being a payment which must be made before probate or administration can be obtained (*o*) ; but not estate duty payable in respect of the subject-matter of a *donatio mortis causâ* (*p*), or in respect of real estate, because it is not required to be paid in order to obtain probate or letters of administration (*q*). A general direction to pay legacies out of a mixed fund of residue charges them rateably on the portions attributable to realty and personalty, and so far as the legacies are payable out of the portion attributable to realty they must be treated as a disposition of real estate and must bear their own estate duty. Estate duty payable in respect of real estate is not a testamentary expense ; and the fact that "testamentary expenses" are

(*i*) Loomes *v.* Stotherd, (1823) 1 Sim. & Stu. 458, 461.

(*k*) Sharp *v.* Lush, (1879) 10 C. D. 468, as explained by Kekewich, J., in *Re* Clemow, [1900] 2 Ch. 182, 190.

(*l*) *Re* Spencer Cooper, [1908] 1 Ch. 130 ; *Re* Orlebar, [1908] 1 Ch. 136, 141.

(*m*) Sharp *v.* Lush, *ubi sup.*

(*n*) *Ante*, p. 345.

(*o*) *Re* Clemow, *ubi sup.*

(*p*) *Re* Hudson, [1911] 1 Ch. 206.

(*q*) *Re* Sharman, [1901] 2 Ch. 280.

directed to be paid out of a mixed fund does not convert into a testamentary expense something which would not otherwise be one (*r*).

Estate duty on personalty over which deceased had a general power of appointment.

(3) Estate duty on personalty over which the deceased had a general power of appointment which he exercised (*s*); it has now been held by the Court of Appeal, after much conflict of decisions, that as between appointees and residuary legatees, the estate duty is not a charge upon the appointed property, but is payable by the executor out of the residuary estate, since the appointed fund is property which "passes to the executor as such" within the meaning of the Finance Act, 1894, s. 9 (1) (*t*). But estate duty in respect of unappointed property is not a testamentary expense and must be paid out of the unappointed fund (*u*).

Where the appointed fund is at the death of the testator a reversionary interest.

Where the appointed fund is, at the death of the testator, still a reversionary interest expectant on a prior life interest the corpus of the fund is under s. 2 (1) (b) property which passes on the testator's death, and estate duty is payable on that corpus under s. 8 (4), and the executor is the person accountable for the duty as a testamentary expense (*x*).

Settlement estate duty.

Settlement estate duty is not payable in order to obtain probate; s. 19 (2) of the Finance Act, 1896 (59 & 60 Vict. c. 28), allowing in every case six months after the death within which it may be paid, and it has no analogy to probate duty. Consequently a direction to pay "testamentary expenses" does not extend to settlement estate duty any more than it would to legacy duty on legacies not otherwise expressed to be given free of legacy duty (*y*).

Legacy duty.

(*r*) *Re* Spencer Cooper, [1908] 1 Ch. 130; see *ante*, p. 207.

(*s*) *Re* Fearnsides, [1903] 1 Ch. 250; *Re* Creed, [1905] W. N. 94.

(*t*) *Re* Hadley, [1909] 1 Ch. 20, overruling *Re* Treasure, [1900] 2 Ch. 648 (Kekewich, J.); *Re* Maddock, [1901] 2 Ch. 372, [1902] 2 Ch. 220 (Kekewich, J.); *Re* Power, [1901] 2 Ch. 659 (Byrne, J.), and following *Re* Moore, [1901] 1 Ch. 691 (Buckley, J.); *Re* Dixon, [1902] 1 Ch. 248 (Buckley, J.); *Re* Fearnsides, *ubi sup.* (Eady, J.); *Re* Creed, [1905] W. N. 94 (Eady, J.); *Re* Orlebar, [1908] 1 Ch. 136 (Neville, J.).

(*u*) Porte *v.* Williams, [1911] 1 Ch. 188.

(*x*) *Re* Avery, [1913] 1 Ch. 208, disapproving, in this respect, *Re* Dixon, *ubi sup.*

(*y*) *Re* King, [1904] 1 Ch. 363.

Direction to pay "duties" covers all duties.

But a direction to pay "free from duty" will include the settlement estate duty, and there would seem to be no distinction between a direction to pay "free from duty" or "without any deduction" (*z*); and a direction to pay "debts, funeral and testamentary expenses and duties" is sufficient to throw the burden of the settlement estate duty, as well as the estate duty payable in respect of specifically devised realty, upon the general residuary estate in exoneration of the specifically devised realty (*a*).

Costs of obtaining probate or letters of administration.

(4) All expenses properly incurred in, about or incidental to obtaining probate or letters of administration (*b*).

Cost of protecting assets.

Cost of obtaining advice.

(5) The costs of collecting and warehousing and protecting the assets (including specific legacies), payment and discharge of debts, and in obtaining the advice of solicitors or counsel as to the distribution of the estate (*c*).

Cost of realisation, including foreign or colonial duties.

(6) All expenses of realisation of foreign or colonial assets, including the payment of duties to the foreign or colonial government, whether such duties are similar to English probate duty or to legacy duty, are deductions to be made as expenses of the estate to be paid out of the estate generally (*d*).

Cost of severing and appropriating a trust fund.

(7) Where the trusts of a gross sum when invested are declared by the Will, the costs of the investment, of severing, appropriating and securing the fund, must come out of the general estate (*e*). But under a direction to accumulate certain securities until the same should amount to a certain sum and then to convert and invest in the purchase of land, the costs of the investment in land are to be paid out of the particular sum directed to be invested (*f*).

(*z*) *Re* Turnbull, [1905] 1 Ch. 726.

(*a*) *Re* Pimm, [1904] 2 Ch. 345; and see *Re* Coxwell's Trusts, [1910] 1 Ch. 63, as to meaning of words "of the clear amount or value."

(*b*) *Re* Clemow, [1900] 2 Ch. 182, 184, 192. On the question of costs as between vendor and purchaser, the production of the probate would be evidence of the title, the procuring of probate would be the making of the title: *Re* Elementary Education Acts, 1870 and 1873, [1909] 1 Ch. 55.

(*c*) Sharp *v.* Lush, (1879) 10 C. D. 468; and see *post*, p. 646.

(*d*) Peter *v.* Stirling, (1878) 10 C. D. 279; *Re* Maurice, (1897) 75 L. T. 415.

(*e*) Handley *v.* Davies, (1859) 5 Jur. (N. S.) 190, following Whopham *v.* Wingfield, (1799) 4 Ves. 630.

(*f*) Gwyther *v.* Allen, (1842) 1 Hare, 505.

Costs of action for administration.

(8) The costs of both plaintiff and defendants of an action properly brought by an executor or administrator for the administration of the personal estate are as a general rule testamentary expenses and will be allowed, and the same rule applies if one of the persons beneficially entitled comes to the Court as plaintiff and asks for directions for the proper administration of the estate (*g*).

Defaulting executor.

A defaulting executor, however, is not entitled to receive costs until his debt is discharged, and therefore his costs must be set off against his debt (*h*).

Where there are co-executors and one is in default and insolvent the solvent executor is entitled to appear in administration proceedings by a separate solicitor. If he appears by the same solicitor as the defaulter he will be allowed only his own proportion of costs out of the fund, the defaulter's proportion being set off against the debt due from him (*i*). It is, however, for the Taxing Master in apportioning the costs to decide whether the solvent executor should be allowed the whole or what part of the common costs as being incurred on his behalf (*k*).

Where the defendant in an administration action is before the Court in a double capacity, as being the executor of the executor of the original testator and representing the original testator's estate, and also as being the executor of the deceased executor who was a defaulting executor of the original testator, he is entitled to his costs as between solicitor and client of taking the accounts of the estate of the original testator and his costs and charges properly incurred in the administration of the trusts of the Will; but as to his costs incurred as executor of the defaulting executor, such costs ought to be allowed solely out of the estate of the defaulting executor; and as to costs incurred

(*g*) Harloe *v.* Harloe, (1875) L. R. 20 Eq. 471; Sharp *v.* Lush, *ubi sup.*; *Re* Prince, [1898] 2 Ch. 225; *Re* Buckton, [1907] 2 Ch. 406, 414; *post*, pp. 354, 674.

(*h*) *Re* Vowles, (1886) 32 Ch. D. 243; and see *post*, p. 516.

(*i*) Smith *v.* Dale, (1881) 18 Ch. D. 516.

(*k*) McEwan *v.* Crombie, (1883) 25 Ch. D. 175; and see *post*, p. 432.

with reference to both estates (the general costs of action) he ought to be allowed half of them out of each estate. The Court, however, in the exercise of its discretion may adjust the division of the costs between the two estates without mathematical accuracy (*l*). But where the executor of the defaulting executor is not the representative of the original testator, any fund recovered out of the estate of the defaulting executor cannot be made subject to his costs as defendant, but he can only retain them out of what remains of his own testator's estate, since the *cestuis que trust* of the original testator claim by a paramount title (*m*).

Where assets are insufficient to pay all the costs.

In an action for the administration of an estate, where the estate proves to be insufficient to pay all the costs, the legal personal representatives are entitled in priority to other parties to be paid their costs, and the costs of the plaintiff, not being the legal personal representative, are the next charge on the estate (*n*) ; and an order in the action that the costs of all parties are to be paid out of a fund does not affect this rule as to priority and amount to a direction that the costs are to be paid equally (*o*). In a suit by creditors to administer realty, there being no personalty, and the realty proving deficient, the Court ordered the costs of the plaintiffs and of the defendants, who were beneficial devisees, to be taxed as between party and party, and paid *pari passu* out of the fund realised, and the balance of the fund to be applied in payment of the plaintiff's extra costs between solicitor and client, and then in payment of debts (*p*). And where in a suit to administer an intestate's estate, the whole of the real estate was applied in payment of debts, the heir-at-law was entitled to his costs as between solicitor and client, being in the position of a trustee holding property

(*l*) *Re* Griffiths, (1884) 26 C. D. 465; and see *Re* Kitto, (1880) 28 W. R. 411, for strict form of order.

(*m*) *Re* Knott, (1887) 56 L. J. Ch. (N. S.) 318.

(*n*) Tipping *v.* Power, (1842) 1 Hare, 405; and see *Re* Turner, [1907] 2 Ch. 126.

(*o*) *Re* Griffith, [1904] 1 Ch. 807, following Gaunt *v.* Taylor, (1843) 2 Hare, 413.

(*p*) Henderson *v.* Dodds, (1866) L. R. 2 Eq. 532, followed in Ferguson *v.* Gibson, (1872) L. R. 14 Eq. 379.

belonging to others ; but where part of the estate was found to belong to the heir and part to the creditors, inasmuch as a benefit accrued to the heir from the proceedings he was entitled to costs only as between party and party, but the administrator got costs as between solicitor and client (*q*).

In legatee's action order in which costs are payable.

In a legatee's action for administration where the estate is sufficient to pay costs, but insufficient to pay the legacies in full, the plaintiff is entitled to his costs out of the fund as between solicitor and client, even where there is a contest between him and another legatee as to the proper mode of dividing the fund (*r*). But where the estate is insufficient to pay costs it would seem that the costs are payable in the following order : first, the costs of the legal personal representative as between solicitor and client ; secondly, the costs and expenses of the plaintiff in selling and getting in the estate, and the costs of the heir in executing deeds ; and, thirdly, the other costs of all parties as between party and party *pari passu* (*s*). A plaintiff who institutes a suit for the benefit of others obtains a charge on the fund, but not necessarily in preference to the defendants (*t*).

In next-of-kin or legatee's action, if estate insolvent, only party and party costs allowed.

In a next-of-kin suit, or in a legatee's suit for administration, where the estate is insufficient for payment of debts, the plaintiff is not entitled to solicitor and client costs, since the Court considers he had no occasion to come to the Court at all (*u*).

In creditor's action, if estate insolvent, solicitor and client costs allowed.

Where the estate is insufficient for payment of debts it belongs to the creditors exclusively, and therefore, if a creditor has, for the benefit of all the creditors, instituted a suit in which he has recovered a fund, he is to be recouped what he has properly expended in recovering it before it is divisible among the creditors *pro rata*, and is entitled to his costs as between solicitor and client and not as between party and

(*q*) Tardrew *v.* Howell, (1861) 2 Giff. 530.

(*r*) *Re* Wilkins, (1884) 27 C. D. 703 ; and see *Re* New Zealand, &c., Co., Smith *v.* Lubbock, [1901] 2 Ch. 357.

(*s*) Wetenhall *v.* Dennis, (1863) 33 Beav. 285.

(*t*) Per Jessel, M.R., in *Re* Middleton, (1882) 19 C. D. 552, 556.

(*u*) *Re* Richardson, (1880) 14 C. D. 611.

party only. This rule applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a next-of-kin or legatee (*x*).

So also, on the same principle, where the testator was one of a firm of traders, and in a creditor's administration action the general estate on realisation turned out sufficient to pay in full the separate creditors including the plaintiff's debt, but insufficient to pay in full the joint creditors, the plaintiff was held to be entitled to costs out of the estate as between solicitor and client (*y*).

In creditor's action, if estate solvent party and party costs only allowed.

In a creditor's administration suit, if the estate proves more than sufficient to pay all the creditors in full, party and party costs only are allowed to the plaintiff creditor (*z*).

Costs of plaintiff in creditor's action where claim is disallowed.

Where in a creditor's administration suit the plaintiff's claim is disallowed the plaintiff's costs are under Ord. 65, r. 1, in the discretion of the judge, and under Ord. 65, r. 14 A, cannot be paid out of the estate without a special direction. If the plaintiff had a fair case and the claim was made *bonâ fide*, and through his exertions the Court is enabled to distribute the estate, or if it makes a declaration of right necessary for its administration, there, although the plaintiff may fail in his claim it would seem the Court will not permit the other creditors to carry off the fruit of his exertions without defraying the costs out of the estate (*a*). The justice of the case would probably be met by allowing the plaintiff, as unsuccessful claimant, his costs of action as between party and party, excepting such additional costs as have been occasioned by his unfounded claim (*b*). The Court may, however, order an unsuccessful claimant to pay all the costs occasioned in resisting his unfounded claim, whether he be plaintiff or otherwise (*c*).

(*x*) *Re* Richardson, (1880) 14 C. D. 611.

(*y*) *Re* McRea, (1886) 32 C. D. 613.

(*z*) Brodie *v.* Bolton, (1834) 3 My. & K. 168.

(*a*) Wedgwood *v.* Adams, (1844) 8 Beav. 103, 105; D. C. P. 7th ed., p. 999; Seton, 7th ed. p. 1404; and see Bartlett *v.* Wood, (1861) 9 W. R. 817, 818, and *post*, p. 403.

(*b*) Cf. Dunning *v.* Hards, (1847) 2 Ph. 294.

(*c*) Hatch *v.* Searles, (1854) 2 Sm. & G. 147; Yeomans *v.* Haynes, (1857)

Right of personal representative or residuary legatee to costs in the absence of special grounds.

Prior to the Judicature Act, 1873, a residuary legatee or personal representative filing a bill for administration had a right to have his costs out of the estate, unless that right was displaced by showing some special grounds for depriving him of them, and this right is saved by Ord. 65 of R. S. C. 1875 (*d*). But this rule of the Court of Chancery did not apply to a hostile action seeking to charge the defendant with costs on the ground of acts of misconduct. Such an action is not an ordinary action (*e*).

Discretion of Court as to costs.

Ord. 65, r. 1, of R. S. C., 1883, provides : " Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge (*f*) ; provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division : Provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge, by whom such action, cause, matter, or issue is tried, or the Court, shall, for good cause, otherwise order."

Costs of an unsuccessful claim or resistance to any claim.

Ord. 65, r. 14 A, of R. S. C., 1893, provides that : " The costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate, unless the Judge shall otherwise direct."

Costs so far as increased by administration of real estate.

Where real and personal estate are being administered in one action, the costs exclusively occasioned by the administration of the real estate, that is, the costs of the action so far

24 Beav. 127 ; Colyer *v.* Colyer, (1862) 10 W. R. 748 ; Lancefield *v.* Iggulden, (1874) 10 Ch. 136.

(*d*) Farrow *v.* Austin, (1881) 18 C. D. 58.

(*e*) Williams *v.* Jones, (1886) 34 C. D. 120.

(*f*) It is not a judicial exercise of discretion to order a successful party, against whom no misconduct is alleged, to pay costs : Kierson *v.* Joseph L. Thompson & Sons, Ltd., [1913] 1 K. B. 587.

only as they have been increased by the administration of the real estate, must be borne by the real estate, the general costs of suit being borne by the personal estate (*g*). This practice has not been altered or affected by the Land Transfer Act, 1897 (*h*). It applies notwithstanding a general direction contained in the Will that the testamentary expenses are to be paid out of the personal estate (*i*).

When costs in Probate Division are testamentary expenses.

The costs of an action properly incurred in the Probate Division to establish a Will, or unsuccessful proceedings in the Probate Division to have a grant of administration when the Court pronounced against the alleged Will, will be allowed as testamentary expenses (*k*).

Jurisdiction of Probate Division to charge real estate with costs as well as personal estate.

Prior to the Land Transfer Act, 1897, the Probate Division had no jurisdiction to charge the real estate with the costs of an unsuccessful action impeaching the validity of the Will (*l*). But now, by virtue of the Land Transfer Act, 1897, the Probate Division has jurisdiction to deal with real estate of a person dying since the commencement of the Act as well as the personal estate, and under s. 2 (3) the real estate of the deceased is to be administered in the same manner, subject to the same liabilities for debts, costs and expenses, and with the same incidents as if it were personal estate. Consequently the Probate Court can say how the costs of the Probate action shall be borne. But if the Probate Court makes no distinction between the various portions of the estate, but merely directs the costs to be paid out of the estate, the costs are payable out of the entirety, and the proper distribution must be made in due course of administration, and where the personal estate is insufficient, the real estate must bear them (*m*).

Effect of order of Probate Division for payment of costs out of the estate.

A charge created by an order of the Probate Division which is not administering the estate can only operate upon what remains after payment of the costs of administration

(*g*) Patching *v.* Barnett, (1881) 51 L. J. Ch. 74; *Re* Middleton, (1881) 19 C. D. 552.
(*h*) *Re* Jones, [1902] 1 Ch. 92.
(*i*) *Re* Betts, [1907] 2 Ch. 149.
(*k*) *Re* Clemow, [1900] 2 Ch. 182.
(*l*) *Re* Prince, [1898] 2 Ch. 225.
(*m*) *Re* Vickerstaff, [1906] 1 Ch. 762.

in the Chancery Division, and is therefore ineffectual, even in express terms, to give priority over the costs of administration of the legal personal representative (*n*).

Effect of direction for payment of testamentary expenses on distribution.

Although a direction in a Will to pay testamentary expenses would include the costs of an administration action whenever commenced, yet if such an action is not probable the Court will give directions for a distribution of the fund without making provision for any such eventuality (*o*).

Lapsed share not primarily liable for costs of administration.

There is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator, consequently the costs of an administration suit come out of the general personal estate and not primarily out of a lapsed share (*p*).

Costs of ascertaining persons entitled to lapsed share.

The costs of ascertaining who are the next-of-kin entitled to a lapsed share must be paid out of the general fund before the residue can be arrived at. Executors, therefore, were held not justified where the residue was divisible between six persons, some of whom predeceased the testator, in paying to the surviving legatees their share, and paying the remainder of the residue into Court under the Trustee Relief Act, without setting apart a fund to answer and pay for the costs of ascertaining the next-of-kin (*q*).

Costs of ascertaining persons entitled to legacies.

So also it is the duty of executors to ascertain who the legatees are ; that is part of the ordinary course of administration, the costs of which are payable out of residue. The executors cannot, by payment into Court, or any other severance of a legacy, release the residue from bearing the costs of an inquiry for the purpose of ascertaining who are the persons entitled to take (*r*).

Distinction where inquiry is directed by the Court.

By Ord. 65, r. 14 B (R. S. C., Nov., 1893), the costs of inquiries to ascertain the persons entitled to any legacy, money, or share, or otherwise incurred in relation thereto,

(*n*) *Re* Mayhew, (1877) 5 C. D. 596.

(*o*) *Re* Cope's Trusts, (1877) 36 L. T. 437.

(*p*) Fenton *v.* Wills, (1877) 7 C. D. 33.

(*q*) *Re* Giles, (1886) 34 W. R. 712.

(*r*) *Re* Gibbons' Will (1887) 36 C. D. 486.

shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct. This rule has not put an end to the power of the Court to make an order carrying out the intention of the testator, as, for instance, where the testator has directed the testamentary expenses to be paid out of the residuary estate (*s*). The words of the rule are, however, general, and it is not intended that the judge should "direct otherwise" merely because the costs of the inquiries are costs of general administration. In the absence of some special circumstances, such as the express direction of the testator, the rule should be followed (*t*).

Rule 14 c provides that where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred, or is likely to occur, in ascertaining the persons entitled to the other shares, the Court or judge may order or allow immediate payment of their shares to the persons ascertained without reserving any part of those shares to answer the subsequent costs of ascertaining the persons entitled to the other shares; and in all such cases such order may be made for ascertaining and payment of the costs incurred down to and including such payment as the Court or judge shall think reasonable.

Release by deed.

It is the practice, when the estate is being wound up without administration proceedings, to give executors or administrators a release by deed at the expense of the estate, although a trustee paying the trust money in strict accordance with the tenor of the trusts is not entitled to a release by deed, even though title may depend on proof of pedigree (*u*). But for a simple pecuniary legacy, involving no dispute as to right or amount, a simple receipt is all the executors are entitled to demand (*x*).

(*s*) *Re* Vincent, [1909] 1 Ch. 810.
(*t*) *Re* Whitaker, [1911] 1 Ch. 214.
(*u*) King *v.* Mullins, (1852) 1 Dr. 308; Warter *v.* Anderson, (1853) 11 Ha. 303.
(*x*) *Re* Fortune's Trusts, (1870) Ir. Rep. 4 Eq. 351, 356.

CHAPTER XXIII.

OF PAYMENT OF DEBTS.

IMMEDIATELY after grant of probate or letters of administration proper advertisements for claims should be inserted in newspapers, pursuant to s. 29 of 22 & 23 Vict. c. 35 (*a*).

Obligation to observe rules as to priority.

In payment of debts the executor or administrator must observe the rules of law as to priority; for if with notice he pays those of a lower degree first, he must, on a deficiency of assets, answer those of a higher degree out of his own estate (*b*). So also he is bound to plead a debt of a higher nature in bar of an action brought against him for a debt of an inferior nature and *riens ultra*, if he has not assets for both, otherwise it will be an admission of assets to satisfy both debts (*c*).

Order of priority.

The order of priority is that which, according to the nature of the debts or of the assets, is prescribed by the laws of the jurisdiction from which the grant issued, and every administrator, principal, or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether, owing to creditors domiciled or resident in that jurisdiction, or out of it, in that order (*d*).

But the ancillary administrator, after paying all such creditors as come in and prove their claims, should transmit the surplus to the principal administrator (*e*).

The following observations apply to the administration of English assets.

(*a*) *Post*, p. 397.
(*b*) Williams (10th ed.) 753.
(*c*) *Ibid.*; and see 1 Saund. 333a, n. (8); also *post*, p. 367.
(*d*) Westlake's Priv. Int. Law (3rd ed.), s. 110.
(*e*) Cook *v.* Gregson, (1854) 2 Drew. 286, 288.

Sect. 1.—*Of Crown Debts.*

Debts due to the Crown by record or specialty have precedence.

To all other debts of whatever nature, as well of a prior as of a subsequent date, such as are due to the Crown by record or specialty, claim the precedence (*f*).

Debts due to the Crown by matter of record or by specialty are of the same nature; for by stat. 33 Hen. VIII. c. 39, it is enacted, that all obligations and specialties, taken to the use of the King, shall be of the same nature as a statute staple (*g*).

Between debts of equal degree Crown's right prevails.

Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails (*h*). Except so far as the legislature has thought fit to interfere, the rule is one of universal application (*i*). In general, the Crown is not bound by a statute unless expressly mentioned, or referred to by necessary implication (*k*).

Crown debts by simple contract not preferred to judgment debt of subject.

Sums of money owing to the King in wood sales, or sales of tin, or other his minerals, for which no specialty is given, shall not be preferred to a debt due to a subject by matter of record. So though fines and amercements in the King's Court of Record are clearly debts of record and entitled to such preference, yet amercements in the King's Courts Baron, or Courts of his Honours, which are not of record, have no such priority; nor have fines for copyhold estate, nor money arising from the sale of estrays within his manors or liberties; for these are not debts of record (*l*). So also arrears of rent due to the Crown, whether it be a fee farm rent, or a rent reserved on a lease for years, are to be regarded as a debt by simple contract (*m*).

(*f*) 2 Inst. 32. A debt created by statute is a specialty debt: Cork & Bandon Railway Co. *v.* Goode, (1853) 13 C. B. 826, *e.g.*, legacy duty is a statutory or specialty debt due to the Crown.

(*g*) See Williams (10th ed.) 756.

(*h*) *Re* Henley & Co., (1878) 9 C. D. 469, 481.

(*i*) New South Wales Taxation Commissioners *v.* Palmer, [1907] A. C. 179, 182.

(*k*) *Re* Henley & Co., *ubi sup.* at p. 482, per Cotton, L.J.; Att.-Gen. for New South Wales *v.* Curator of Intestate Estates, [1907] A. C. 519, 522.

(*l*) Williams (10th ed.) 756.

(*m*) *Ibid.*

Mode of apportioning assets in giving effect to Crown's preference.

In *Re Bentinck* (*n*), a testator died insolvent after 1870, owing specialty and simple contract debts, including a simple contract debt to the Crown. The assets were more than sufficient for payment of the Crown debt after satisfying the specialty debts. It was held that having regard to Hinde Palmer's Act (32 & 33 Vict. c. 46) (*o*), the assets ought first to be apportioned rateably between the specialty and simple contract debts, and that the Crown debt ought then to be taken out of the amount apportioned to the simple contract debts.

Credit for probate duty considered a Crown debt.

By stat. 55 Geo. III. c. 184, s. 45, the commissioners of stamps are authorised, in certain cases upon giving security, to give credit for the duties on probates and administrations ; and by sect. 48 it is provided that the duty for which credit shall be so given shall be a debt to the Crown, and shall be paid in preference to and before any other debt whatsoever.

Surety to Crown on payment of debt entitled to Crown's priority.

A surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate (*p*).

Sect. 2.—*Of Certain Preferential Debts.*

Certain debts are given priority by statute over all other claims (*q*).

Sums due from deceased overseer of the poor.

By 17 Geo. II. c. 38, s. 3, the assets of a deceased overseer of the poor are primarily liable for all sums remaining due which he received by virtue of his office.

Sums due from officer of a registered Friendly Society.

By 59 & 60 Vict. c. 25, s. 35, upon the death of any officer of a registered Friendly Society, having in his possession by virtue of his office any money or property belonging to the society, his legal personal representative shall, upon demand

(*n*) [1897] 1 Ch. 673.

(*o*) See *post*, p. 371.

(*p*) *Re* Lord Churchill, (1888) 39 C. D. 174.

(*q*) The Crown is not bound by a statute, unless expressly mentioned or referred to by necessary implication : *Re* Henley & Co., (1878) 9 C. D. 469 ; *ante*, p. 362, but see Williams (10th ed.) 759, and *Re* Galvin, (1898) W. N. 140 (C. A. Ireland), as to the probable precedence of these debts to those due to the Crown.

in writing of the trustees, pay the money or deliver over the property to the trustees in preference to any other debt or claim against the deceased's estate. This statute gives priority to the trustees although the debtor's assets consisted of furniture, stock-in-trade, and other property, which cannot be considered as specifically belonging to the society (*r*), or of sums not specifically traceable (*s*).

Regimental debts.

By 56 Vict. c. 5 (the Regimental Debts Act, 1893), s. 2, certain payments are made preferential charges on the property of a person dying while subject to military law.

Sums due from collector to metropolis paving commissioners.

By 57 Geo. III. c. 29, s. 51 (Metropolis Act, local), sums collected by a deceased treasurer or collector to paving commissioners are payable in preference to other debts except Crown debts (*t*).

Sums due from officer of savings bank.

By 26 & 27 Vict. c. 87 (Savings Banks Act, 1863), s. 14, where a deceased officer of a savings bank had at the time of his death monies or effects belonging to the bank in his possession the legal personal representative shall deliver and pay over all monies and other things belonging to the bank, and out of the assets of such deceased person shall pay all sums of money remaining due before any other of his debts are paid or satisfied. But in the administration by the Court of an insolvent's estate the priority given by this section is taken away by s. 40 of the Bankruptcy Act, 1883 (*u*).

Preferential payments where insolvent estate is being administered by the Court.

Where the estate of a person dying insolvent is being administered in bankruptcy under s. 125 of the Bankruptcy Act, 1883 (*x*), or under an order in the Chancery Division (*y*), the provisions of the Preferential Payments in Bankruptcy Act, 1888 (*z*), apply, whereby the following claims are to be paid in priority to all other debts.

(*r*) *Re* Atkins, (1882) 51 L. J. Ch. 406.

(*s*) *Re* Miller, [1893] 1 Q. B. 327; and see *Re* Eilbeck, [1910] 1 K. B. 136.

(*t*) See Williams (10th ed.) 758.

(*u*) *Re* Williams, (1887) 36 C. D. 573.

(*x*) 46 & 47 Vict. c. 52.

(*y*) *Re* Heywood, [1897] 2 Ch. 593.

(*z*) 51 & 52 Vict. c. 62, s. 1 (1); but query whether the priority of the Crown is affected by s. 10 of the Judicature Act, 1875, *post*, p. 375.

(*a*) All parochial or other local rates having become due and payable within twelve months next before the date of death, and all assessed taxes, land tax, property or income tax up to the 5th day of April next before the death and not exceeding in the whole one year's assessment.

(a) Rates and taxes.

(*b*) All wages or salary of any clerk or servant in respect of services rendered to the deceased during four months before the date of his death, not exceeding £50.

(b) Wages or salary of clerk or servant not exceeding £50.

(*c*) All wages of any labourer or workman not exceeding £25, whether payable for time or for piecework in respect of services rendered to the deceased during two months before the date of death. Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority for the whole of such sum, or a part thereof, as the Court may decide to be due under the contract proportionate to the time of service up to the date of the death.

(c) Wages of labourer or workman not exceeding £25.

By sub-s. (2) the foregoing debts rank equally between themselves. The Act, however, by s. 2 (1), is without prejudice to the Friendly Societies Act, 1875, and shall not affect the priority given to the payment of funeral and testamentary expenses by s. 125 of the Bankruptcy Act, 1883 (*a*), in the administration in bankruptcy of the estate of a person dying insolvent.

By s. 5 (3) of the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58), the amount, not exceeding £100, due in respect of any compensation is to be included among debts having priority under the Preferential Payments in Bankruptcy Act, 1888.

(d) Sums not exceeding £100 in respect of workman's compensation.

Sect. 3.—*Of Judgments.*

Judgments are next in priority of payment and the privilege extends to judgments in all Courts of Record (*b*).

With regard to judgments obtained against the testator or intestate in his lifetime, priority of date is not material,

Judgments obtained against testator or intestate.

(*a*) 46 & 47 Vict. c. 52, s. 125 (7). (*b*) Williams (10th ed.) 762.

but he who first sues out execution must be preferred ; and before any execution sued, it is at the election of the executor or administrator to pay whom he will first (*c*).

Position of surety after satisfying judgment.

A surety who has satisfied a judgment obtained by the creditor against the debtor and his sureties is entitled to stand in the place of the judgment creditor, not only against the estate of the principal debtor, but also against the estate of a co-surety to obtain repayment of what he has paid in excess of his fair contribution ; and to have priority over the unsecured creditors of the deceased, even in the administration of his estate by the Court, since the unsecured creditors are in no worse position than if the judgment creditor had exhausted his whole claim by enforcing it against the deceased's estate ; and there is no occasion for the surety to obtain an assignment of the judgment in order to gain priority (*d*).

Position of surety before judgment.

Where there is an actual accrued debt secured by a guarantee, and one of several co-sureties is liable, and admits liability for the amount guaranteed, he has a right in equity to compel the principal debtor to relieve him from his liability by paying the debt, and this equitable relief is not limited to cases where the creditor has refused to sue the principal debtor, and it would seem that neither the creditor nor the co-sureties need be parties (*e*).

Effect of Land Charges Act, 1900, as to unregistered judgments.

Under s. 3 of 23 & 24 Vict. c. 38, a judgment recovered against the testator or intestate unless registered was not entitled in the administration of the deceased's estate to any preference over the simple contract debts of the deceased (*f*). This Act is repealed by s. 5 of 63 & 64 Vict. c. 26 (the Land Charges Act, 1900) as from the 1st July, 1901. Notwithstanding s. 38 of the Interpretation Act, 1889 (*g*), it may be contended that the effect of the repeal is to leave or revive

(*c*) Williams (10th ed.) 766.

(*d*) *Re* M'Myn, (1886) 33 C. D. 575.

(*e*) Ascherson *v.* Tredegar Dry Dock and Wharf Co., Ltd., [1909] 2 Ch. 401 ; and see *Re* Mitchell, [1913] 1 Ch. 201, 206.

(*f*) Van Gheluive *v.* Nerinckx, (1882) 21 C. D. 189.

(*g*) 52 & 53 Vict. c. 63, and cf. Mirfin *v.* Attwood, (1869) L. R. 4 Q. B. 333 (Hannen, J., *diss.*).

the common law priority of an unregistered judgment unrestricted by any condition as to registration, and until this question has been judicially determined it would not be safe to prefer a simple contract debt to an unregistered judgment (*h*).

Judgments obtained against personal representative.

In a suit to administer the estate of a testator or intestate judgments recovered against an executor or administrator for assets *quando acciderint* are payable according to their respective dates out of legal assets (*i*). Although the Court does not deprive the creditor of any legal advantage which he has acquired, yet if, without its assistance, he cannot obtain payment even out of legal assets, the Court does not give him assistance to enable him to obtain priority to other creditors (*k*).

Mode of pleading.

If the executor or administrator has not assets to satisfy the debt upon which an action is brought against him, he must take care to plead *plene administravit* or *plene administravit præter*, etc., otherwise if the estate of the deceased is insufficient to satisfy the judgment, unless it is of assets *in futuro*, he will be compelled to do so *de bonis propriis* (*l*).

Costs of action.

Where the Court is satisfied that the defendant has duly administered all assets come to his hands it would seem that the defendant is entitled to his costs of action against the plaintiff, and the plaintiff, where the debt is undisputed, is entitled to judgment for the same with his costs of action as against future assets, *quando acciderint* (*m*).

Priority over specialty.

Since 32 & 33 Vict. c. 46 (*n*), which abolished the distinc-

(*h*) See *post*, p. 377.

(*i*) Dollond *v.* Johnson, (1854) 2 Sm. & G. 301; see *post*, p. 391, as to distinction between legal and equitable assets.

(*k*) Gaunt *v.* Taylor, (1843) 2 Hare, 413, 419.

(*l*) See *ante*, p. 361; as to the defences which executors or administrators should plead, see Williams (10th ed.) 1583; Bullen & Leake (6th ed.), pp. 649 *et seq.*; *Re* Marvin, [1905] 2 Ch. 490; and see Lacons *v.* Warmoll, [1907] 2 K. B. 350, 365, per Buckley, L.J., as to remedy of creditor against one of several executors and form of judgment.

(*m*) See Tables and Practice Masters' Rules, No. 38, App. R.S.C., p. ix; also Ann. Prac., note to Or. 14, r. 1, where the different forms of judgment against executors or administrators, according to whether they show *plene administravit* or not, are given.

(*n*) *Post*, p. 371.

tion between specialty and simple contract debts, a judgment against the legal personal representative for a simple contract debt will obtain priority over specialty debts, but it was otherwise prior to the Act (*o*).

In administration by the Court of insolvent estates judgment and other creditors are paid *pari passu*.

In the administration by the Court of an insolvent estate, judgment creditors will be paid *pari passu*, and not in priority of time (*p*), and rateably with other creditors (*q*).

Judgment recovered under 3 & 4 Will. IV. c. 42, s. 2, has no priority.

By 3 & 4 Will. IV. c. 42, s. 2, damages under the Act in an action against executors or administrators of any deceased person for injury committed by him in his lifetime to another in respect of real or personal property are payable in like order of administration as the simple contract debts of such person.

Order under Ecclesiastical Dilapidations Act, 1871, gives no priority.

Also where the bishop has, under s. 34 of the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), made an order stating the cost of the repairs for which the personal representatives of a late incumbent are liable, the sum so stated is, under s. 36, a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors (*r*).

Effect of death between verdict and judgment.

Ord. 17 of R. S. C. provides that there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death.

How judgments are to be dated:

when pronounced in Court;

when made in Chambers.

A judgment pronounced in Court when entered relates back to and is to be dated the day on which it was pronounced, unless the judge should direct it to be ante-dated or post-dated (*s*). But judgments not pronounced by the Court or a judge in Court, but made in Chambers are dated as of the day on which the requisite documents are left with the proper officer for the purpose of entry (*t*).

(*o*) *Re* Williams' Estate, (1872) L. R. 15 Eq. 270.

(*p*) M'Causland *v.* O'Callaghan, [1904] 1 I. R. 376.

(*q*) *Post*, p. 373.

(*r*) *Re* Monk, (1887) 35 C. D. 583.

(*s*) Ord. 41, r. 3; and see Guardians of West Ham *v.* Churchwardens of Bethnal Green, [1895] 1 Q. B. 662.

(*t*) Ord. 41, r. 4. Filing is now substituted for entry.

Where between the trial of an action and the delivery of judgment one of the defendants dies, the Court has jurisdiction to date the judgment as of the last day of the trial (*a*).

Effect of death between trial and judgment.

Where the death happens between interlocutory and final judgment the judgment is entered up against the executor or administrator (*b*).

Effect of death between interlocutory and final judgment.

Under Ord. 42, r. 23, if any change has taken place by death in the parties liable to execution, or where a party is entitled to execution upon a judgment of assets *in futuro*, an order for leave to issue execution is necessary. Leave given under this rule does not operate as a judgment against the executor or administrator, or enable the judgment creditor to obtain a charging order against the executor or administrator in respect of the judgment debt of the deceased (*c*).

When leave to issue execution is necessary:

does not operate as a judgment against personal representative.

Up to the Act 23 & 24 Vict. c. 38, there were provisions that a judgment should not affect lands unless it was registered. The Act 23 & 24 Vict. c. 38 added the provision that a judgment should not affect lands until execution had been issued, and the judgment and writ of execution should both be registered. The object was to prevent the issuing of writs and the non-execution of them and to protect purchasers. The Act 27 & 28 Vict. c. 112 provided that no judgment or writ should affect land until the land had been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority. But it was held that since 27 & 28 Vict. c. 112, when land had been actually delivered in execution by writ of *elegit*, or other lawful authority, it was unnecessary to register the judgment, writ, or other process of execution, except for the purpose of obtaining under s. 4 of that Act a summary order for sale, for which purpose registration pursuant to s. 3 of the same Act was necessary (*d*). Now by s. 2 of the Land Charges Act, 1900 (63 & 64 Vict. c. 26), a judgment or recognisance, whether obtained or entered into on

How and when judgment operates as a charge on land.

(*a*) Turner *v.* L. & S. W. Ry. Co., (1874) L. R. 17 Eq. 561. Ecroyd *v.* Coulthard, [1897] 2 Ch. 554.

(*b*) Smith *v.* Eyles, (1742) 2 Atk. 385, 386.

(*c*) Stewart *v.* Rhodes, [1900] 1 Ch. 386.

(*d*) *Re* Pope, (1886) 17 Q. B. D. 743.

behalf of the Crown or otherwise, whether obtained or entered into before or after the commencement of the Act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land unless and until a writ or order for the purpose of enforcing it is registered under s. 5 of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51).

Sect. 4.—*Of Recognizances and Statutes.*

Rank next after judgments.

Recognizances and Statutes rank next in priority after judgments (*e*).

Recognizance, nature of.

A recognizance is an obligation of record; it may be entered into by the party before a Court of Record, or a magistrate duly authorised, conditioned for the performance of a particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like (*f*).

A recognizance to constitute a record must be enrolled (*g*).

Recognizances rank equally as against the personal estate, and the executor may prefer a subsequent to a prior recognizance (*h*).

Statutes, nature of.

Statutes which were statutes merchant, statutes staple, and recognizances in the nature of statutes staple, have fallen into disuse (*i*).

Sect. 5.—*Of Specialty and Simple Contract Debts.*

Formerly specialty debts had priority out of legal assets.

Formerly specialty debts, *i.e.*, debts on bonds and covenants under seal, took priority over debts by simple contract. But this rule applied only to legal assets. It was a rule in equity that equitable assets were to be applied *pari passu* in the payment of all specialty as well as simple contract debts, in equal shares and proportions (*k*).

(*e*) Williams (10th ed.) 767.

(*f*) *Ibid.*; and see 2 Bl. Com. 341.

(*g*) Glynn *v.* Thorpe, (1817) 1 B. & Ald. 153.

(*h*) Williams (10th ed.) 770.

(*i*) For information relating to securities by Statute, see Williams (10th ed.) 768 *et seq.*

(*k*) Per Sir J. Romilly, M.R., in Markwell *v.* Markwell, (1864) 34 Beav. 12, 18.

Effect of Hinde Palmer's Act, 1869.

The priority, however, was abolished by Hinde Palmer's Act, 1869 (32 & 33 Vict. c. 46), which provides that all the creditors of any person dying on or after the 1st January, 1870, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, but without prejudice to any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt.

Right to prefer simple contract to specialty creditor.

The Act having placed the simple contract creditor and the specialty creditor on an equal footing *inter se* in the administration of an estate, the executor or administrator in the exercise of his administrative right to prefer one creditor to another may now pay a simple contract creditor in priority to a specialty creditor of the testator (*l*).

Effect of Act on priority of rent.

Rent, though not a specialty debt, had formerly all the privileges of a specialty debt, and consequently it was held in *Re Hastings* (*m*) that it was within the meaning of Hinde Palmer's Act, and was no longer entitled to priority in payment over simple contract creditors.

Equitable rule as to voluntary creditors.

Apart from s. 10 of the Judicature Act, 1873, the equitable rule of administration prefers debts for value to debts for the same or a higher class not for value, which in all other respects stand on the same footing. But a voluntary bond assigned for value stands upon the same footing as a bond originally given for value upon the ground of an assignee for value having a better equity (*n*). Persons entitled under a voluntary covenant have the right to prove against all the assets of the covenantor (*o*), and to have the estate marshalled in their favour, and a deed void as against all the creditors under 13 Eliz. c. 5 is equally void against voluntary creditors of the deceased, since a voluntary debt being a good debt in a

(*l*) *Re* Samson, [1906] 2 Ch. 584, overruling *Re* Hankey, [1899] 1 Ch. 541, in this respect.

(*m*) (1877) 6 C. D. 610.

(*n*) Payne *v.* Mortimer, (1859) 4 De G. & J. 447, and cf. Halifax Joint Stock Banking Co. *v.* Gledhill, [1891] 1 Ch. 31.

(*o*) Hales *v.* Cox, (1863) 32 Beav. 118; Mallott *v.* Wilson, [1903] 2 Ch. 494.

Court of Law there is no reason why, for the purposes of the statute of Elizabeth, it should not be held a good debt in a Court of Equity (*p*).

It would seem also that a voluntary debt has priority over an allowance of interest under Ord. 55, r. 62, on a debt not carrying interest, since the allowance of interest is a bounty given to the creditor out of the fund which, but for the Order, would have gone to the debtor (*q*).

Payee of promissory note without consideration has no claim.

The payee of a promissory note for which there was no consideration is not in the same position as the payee of a voluntary bond, even in the administration of a solvent estate, since he cannot maintain an action at all (*r*).

Nor payee of bond *ex turpi causa*.

A bond *ex turpi causa* is void (*s*), and therefore cannot be treated as a voluntary bond.

Effect of s. 10 of the Judicature Act, 1875, as to voluntary creditor.

The effect of s. 10 of the Judicature Act, 1875, is to introduce into the administration by the Court of the estates of deceased insolvents the rule in bankruptcy that voluntary creditors are to be paid *pari passu* with creditors for value (*t*).

Sect. 6.—*Of Contingent Debts.*

Distinction between future and contingent debts.

There is a distinction between future and contingent debts. A recognizance for payment of a debt at a day certain though future is of the same class with other recognizances. But with respect to contingent debts, since the executor could not generally pay anything until the contingency had occurred, it was held they should not stand in the way of debts of inferior degree, and this applied equally to recognizances and specialties; but as soon as the contingency has happened by a breach of the condition, the securities stand in the same rank as other debts (*u*).

(*p*) Markwell *v.* Markwell, (1864) 34 Beav. 12; Adams *v.* Hallett, (1868) L. R. 6 Eq. 468.

(*q*) Garrard *v.* Lord Dinorben, (1846) 5 Hare, 213.

(*r*) *Re* Whitaker, (1889) 42 C. D. 119.

(*s*) Robinson *v.* Gee, (1749) 1 Ves. Sen. 250.

(*t*) *Re* Whitaker, [1900] 2 Ch. 676; [1901] 1 Ch. 9; see *post*, p. 373.

(*u*) See Williams (10th ed.) 773 *et seq.*; and see *post*, pp. 374, 395.

SECT. 7.—*Of the Effect of s.* 10 *of the Judicature Act,* 1875.

Effect of s. 10 of the Judicature Act, 1875.

Sect. 10 of the Judicature Act, 1875, provides that in the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, may come in under the decree or order for the administration of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this Act (*x*).

As to valuing securities.

Prior to the Judicature Act the rules applied by the Court of Chancery in administering an insolvent estate differed in many respects from those applied by the Court of Bankruptcy. In particular in chancery secured creditors were entitled to a dividend on the full amount of their debts, whereas in bankruptcy secured creditors only proved for the balance after valuing their securities. Moreover in bankruptcy all creditors, including judgment creditors, are paid rateably and not in priority of time, and voluntary creditors are paid *pari passu* with creditors for value (*y*).

As to judgment creditors.

As to voluntary creditors.

As to claim by lessee under covenant for indemnity.

A claim by lessees against an assignee of a lease under a covenant for indemnity by the assignee against breaches of covenants in the lease was held provable in the bankruptcy of

(*x*) Sect. 45 of the Bankruptcy Act, 1883, restricting the rights of creditors under execution or attachment, is not made applicable to the administration of insolvent estates in the Chancery Division by the Judicature Act, 1875, s. 10; Pratt *v.* Inman, (1889) 43 C. D. 175; and see Hasluck *v.* Clark, [1899] 1 Q. B. 699, as to the rights of the execution creditor after an administration order under s. 125 of the Bankruptcy Act, 1883, *post*, p. 685.

(*y*) *Re* Whitaker, [1900] 2 Ch. 676, 677, per Cozens-Hardy, J.; (C. A.), [1901] 1 Ch. 9; M'Causland *v.* O'Callaghan, [1904] 1 I. R. 376.

the assignee (*z*), and therefore such a claim is provable against the assets of the deceased assignee in the administration by the Court of his insolvent estate.

As to claim by company for unpaid calls and liability to future calls.

So also it has been held that a company may prove in the administration by the Court of the estate of a deceased shareholder, whose estate is insolvent, not only for unpaid calls, but also for the estimated value of the liability to future calls in respect of the shares standing in his name (*a*).

Where, however, the estate is solvent the cases establish the practice of allowing distribution without regard to the existence of contingent liabilities—the order of the Court sufficiently protecting the personal representative, and the creditor, on the contingency happening, being left to his remedy of following the assets (*b*).

As to claim for estimated value of an annuity.

In the case of an annuity payable under a covenant by a testator with trustees, so long as no payment is in arrear there is no right to bring an action at law against the executors, and, therefore, no right to an order for the administration of the estate, although the estate is insufficient to pay the estimated value of the annuity as well as other debts and liabilities. But if an administration order is obtained by some other person the trustees would be entitled to prove for the estimated value of the annuity (*c*).

So an administratrix, an annuitant under covenant by her intestate, whose estate was insolvent and was being administered by the Court, was held entitled to retain all arrears falling due during administration, and to prove for the value of her future annuity (*d*).

Sect. 10 only applies in administration of assets by the Court.

Sect. 10 of the Judicature Act, 1875, has not in any way affected the administration of assets except in legal proceedings. It leaves executors and administrators to administer assets out of Court just as they did before (*e*).

(*z*) Hardy *v.* Fothergill, (1888) 13 App. Cas. 351.

(*a*) *Re* McMahon, [1900] 1 Ch. 173.

(*b*) *Re* King, [1907] 1 Ch. 72; and see *post*, p. 395.

(*c*) *Re* Hargreaves, (1890) 44 C. D. 236.

(*d*) *Re* Beeman, [1896] 1 Ch. 48.

(*e*) Per Lindley, J., in *Re* Hargreaves, *ubi sup.* at p. 242.

Although under the Bankruptcy Act, 1883 (*f*), the priority of the Crown is taken away, yet it is doubtful whether s. 10 of the Judicature Act, 1875, imports into administration proceedings in Court so much of the Bankruptcy Act, 1883, as relates to the Crown's priority so as to bar the prerogative right of the Crown (*g*).

Doubtful whether it affects Crown's priority.

Sect. 10 applies to an estate of a deceased person which is sufficient for the payment in full of his debts and liabilities apart from costs of administration, but becomes insufficient by reason of such costs (*h*).

Applies to an estate becoming insufficient owing to costs of administration.

(*f*) 46 & 47 Vict. c. 52, ss. 30, 40, 150.

(*g*) *Re* Oriental Bank Corporation, *Ex parte* The Crown, (1884) 28 C. D. 643, 649; and see Williams (10th ed.) 760.

(*h*) *Re* Leng, [1895] 1 Ch. 652.

CHAPTER XXIV.

OF THE POWER OF PREFERENCE.

Among creditors of equal degree an executor or administrator may pay one in preference to another, and, since Hinde Palmer's Act, specialty creditors and simple contract creditors being on an equal footing *inter se*, he may pay a simple contract creditor in priority to a specialty creditor (*a*). Among creditors of equal degree.

If however a creditor obtains judgment against the executor or administrator he must be satisfied before other creditors (*b*), and the right of preference is thereby precluded as against him ; but if before the judgment is satisfied an administration order is made the estate being insolvent he will have to come in on an equal footing with simple contract creditors (*c*). Creditor obtaining judgment gains priority.

After an order for administration has been made the power of preference no longer exists, but until then the Court will not on interlocutory application appoint a receiver or grant an injunction merely to prevent the executor or administrator exercising his legal right of preference (*d*). After administration order power of preference ceases.

By the present form of bond required to be given by a creditor on a grant to him of administration he is bound to pay the debts rateably and proportionably and according to the priority required by law, not, however, preferring his own debt by reason of his being administrator (*e*). Form of creditor's administration bond.

(*a*) *Re* Samson, [1906] 2 Ch. 584, overruling *Re* Hankey, [1899] 1 Ch. 541.

(*b*) *Re* Williams' Estate, (1872) L. R. 15 Eq. 270.

(*c*) *Re* Whitaker, [1900] 2 Ch. 676, 677, (C. A.), [1901] 1 Ch. 9 ; M'Causland *v.* O'Callaghan, [1904] 1 I. R. 376 ; disapproving Smith *v.* Morgan, (1880) 5 C. P. D. 337.

(*d*) *Re* Wells, (1890) 45 C. D. 569, and see *post*, pp. 384, 404.

(*e*) See Practice note (1899) W. N. 262, and Form 59 in Tr. & Coo. P. P. (14th ed.), p. 798.

This form of bond deprives the creditor administrator of the power of preferring his own debt, but it does not prevent him preferring the debt of any other creditor of the deceased (*f*).

(*f*) See Davies *v.* Parry, [1899] 1 Ch. 602, 606, per Romer, J., and *Re* Belham, [1901] 2 Ch. 52.

CHAPTER XXV.

OF THE RIGHT OF RETAINER.

Right of retainer in preference to other creditors of equal degree.

An executor or administrator, not being a creditor administrator (*a*), has a right to retain out of legal assets (*b*) for his own debt due to him from the deceased in preference to all other creditors of equal degree. For since he cannot commence an action against himself to recover his own debt, the law places him in the same position as if he had sued himself as executor and recovered his debt (*c*). The right to retain extends both in law and in equity to all legal assets which the executor or administrator has in his hands but not to equitable assets (*d*). The right, however, extends to equitable debts, that is, such as can only be effectually ascertained through a Court of Equity (*e*).

Applies to legal, not equitable assets.

Extends to equitable debts.

Retainer in specie allowed where value of whole assets is less than the debt.

Where the value of the whole of the assets is less than the debt due to the executor he is not bound to realise before exercising a right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt (*f*).

Effect of Hinde Palmer's Act.

As to the effect of Hinde Palmer's Act (*g*) on the right of retainer, in the case of *Wilson* v. *Coxwell* (*h*) a right of retainer being claimed on behalf of the estate of an executor who was a simple contract creditor and there being a specialty creditor, it was held that the assets (after payment of costs) must be apportioned on the footing of giving an equal dividend to all

(*a*) A creditor administrator is now precluded from retaining by the form of the administration bond, see *ante*, p. 377.

(*b*) See *post*, p. 391, as to the distinction between legal and equitable assets.

(*c*) See Williams (10th ed.) 785, and *Re* Compton, (1885) 30 C. D. 15, 19, per Cotton, L.J.

(*d*) *Re* Baker, (1890) 44 C. D. 262, 272; *Re* Rhoades, [1899] 2 Q. B. 347, 354.

(*e*) *Re* Morris's Estate, (1874) L. R. 10 Ch. 68; and see *post*, p. 381.

(*f*) *Re* Gilbert, [1898] 1 Q. B. 282, and see *ante*, p. 225.

(*g*) *Ante*, p. 371.

(*h*) (1883) 23 C. D. 764.

the creditors (specialty and simple contract) ; that the dividend must be paid in full to the specialty creditor ; that the executor must then retain his debt out of the residue ; and that the surplus (if any) must be divided equally among the simple contract creditors. This principle of distribution was followed with approval by Kay, J.. in *Re Jones* (*i*), by Chitty, J., in *Re Briggs* (*k*) and by Stirling, J., in *Re Bentinck* (*l*) ; but it did not meet with the approval of the Court of Appeal in *Re Samson* (*m*), although the question was not determined.

Although the right of retainer, as it produces inequality, is never assisted (*n*), yet it would seem (*o*) that Hinde Palmer's Act, having augmented the fund for payment of simple contract creditors, has to this extent enlarged the right of retainer. In *Re Jennes* (*p*), Neville, J., though he considered that the same principle applied to the right to retain, as to the right to prefer, as a necessary inference from the judgments in *Re Samson*, yet inasmuch as the Court of Appeal expressly reserved any decision on the point, he considered he was bound to follow the cases and practice of the Chancery Division for the last twenty years, and held, therefore, that the executor had no right to retain a simple contract debt as against a specialty creditor.

Retainer not affected by s. 10 of the Judicature Act, 1875.

A right of retainer is not affected by s. 10 of the Judicature Act, 1875 (*q*).

Right exerciseable by married woman against deceased husband's creditors for loan to husband for purposes of his business.

Although the effect of s. 3 of the Married Women's Property Act, 1882, is to place the amount of a loan made by a married woman to her husband for the purposes of his business in an inferior class to the debts due to other creditors for value, yet this only affects her right to prove, and not her right of retainer, and, therefore, though that section, and s. 10 of the Judicature Act, 1875, prevents her from

(*i*) (1885) 31 C. D. 440.
(*k*) (1894) W. N. 162.
(*l*) [1897] 1 Ch. 673.
(*m*) [1906] 2 Ch. 584.
(*n*) Hopton *v.* Dryden, (1700) Prec. in Ch. 179 ; 2 Eq. C. 450.
(*o*) See observations of Kay, J., in *Re* Jones, *ubi sup.*, and other cases above cited.
(*p*) (1909) 53 Sol. J. 376.
(*q*) Lee *v.* Nuttall, (1879) 12 C. D. 61.

proving for such a loan in the administration of her deceased husband's estate (if insolvent) in competition with his creditors for value, yet, if she is her husband's executrix, she can as against those creditors retain the amount of the loan out of assets in her hands as executrix (*r*).

Right not restricted to an ascertained debt.

The right of retainer is not restricted to an ascertained debt but extends to a debt which requires accounts to be taken (*s*), also to a claim for damages arising from the breach of a pecuniary contract for which there is a certain standard or measure, for instance, damages in case of breach of covenant to assign a policy or to replace furniture (*t*). But damages that are in their nature arbitrary, such as damages founded upon torts, cannot be retained (*u*).

Right must be asserted during lifetime, but having asserted it executor's representatives may exercise it.

An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor, or is paid into Court during his lifetime (*x*) ; and if an executor asserts a right of retainer, but dies without having exercised it, whether he were the sole executor (*y*), or left another executor of the original testator surviving (*z*), his representatives may exercise the right for the benefit of the estate of the deceased executor ; but only as to anything which came into the actual possession or under the actual control of the deceased executor, or which was paid into Court during his lifetime.

No retainer out of assets under 3 & 4 Will. IV. c. 104;

Real estate not charged with payment of debts is by 3 & 4 Will. IV. c. 104 made assets to be administered in Courts of Equity, and therefore being equitable assets an executor has no right of retainer against it (*a*).

nor out of proceeds of real estate directed to be sold.

So also an estate devised to an executor upon trust for sale for payment of debts is equitable assets against which no right of retainer exists (*b*).

(*r*) *Re* Ambler, [1905] 1 Ch. 697, following *Re* May, (1890) 45 C. D. 499, and *Re* Leng, [1895] 1 Ch. 652.

(*s*) *Re* Morris's Estate, (1874) L. R. 10 Ch. 68.

(*t*) *Re* Compton, (1885) 30 C. D. 15.

(*u*) Loane *v.* Casey, (1770) 2 W. Bl. 965.

(*x*) *Re* Compton, *ubi sup.*

(*y*) *Ibid.*

(*z*) Wilson *v.* Coxwell, (1883) 23 C. D. 764.

(*a*) Walters *v.* Walters, (1881) 18 C. D. 182.

(*b*) Bain *v.* Sadler, (1871) L. R. 12 Eq. 570.

Land Transfer Act, 1897, confers no new right of retainer.

The Land Transfer Act, 1897, which vests real estate of a deceased person in his personal representative, and provides for the administration of real estate in the same manner, subject to the same liabilities for debts, costs and expenses, and with the same incidents as if it were personal estate, does not confer any new right of retainer or priority in favour of the personal representative, by reason of the comprehensive over-riding proviso at the end of s. 2, sub-s. 3, that nothing shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies (*c*).

Right of heir or devisee to retain.

Formerly the heir or devisee had a similar right to the executor or administrator of retainer out of legal assets in respect of a specialty, and for similar reasons. The heir could be sued at law in respect of any debt due on specialty in which the heirs were bound, and was liable to the extent of the real estate descended to him. The devisee under the Act 3 & 4 Will. and Mary c. 14, and ultimately under 11 Geo. IV. and 1 Will. IV. c. 47, stood in the same position as the heir. The specialty creditor could bring an action at law under the statute against the devisee and recover up to the value of the devised estate. The devised estate was legal assets, because it could be got at by an action at law (*d*). But where lands were charged by Will with payment of debts, if the legal estate descended the heir had no right of retainer ; and if the estate was devised subject to a charge of debts the devisee also had no right of retainer (*e*). When the stat. 3 & 4 Will. IV. c. 104, was passed, real estate was not assets at law for the purpose of paying simple contract creditors, and the statute did not make the real estate legal assets—it was only assets to be dealt with in a Court of Equity. But the common law right of action given to a

(*c*) *Re* Williams, [1904] 1 Ch. 52.

(*d*) *Re* Illidge, (1884) 27 C. D. 478, 483, per Lindley, L.J. ; *Re* Lacey, [1907] 1 Ch. 330, 347, per Farwell, L.J.

(*e*) *Re* Illidge, (1883) 24 C. D. at p. 660, per Chitty, J.

creditor by specialty in which the heirs are bound, is not taken away, and therefore does not take away the right of the heir or devisee to retain in respect of a specialty in which the heirs are bound (*f*). However, since the Land Transfer Act, 1897, where that Act applies, and so long as the land is vested in the personal representative, it would seem the heir or devisee cannot have any right of retainer.

Separate property of testatrix is not subject to retainer.

There is no right of retainer by an executor out of property which belonged to his testatrix for her separate use (*g*); but the reason would seem to be that separate use being a creature of equity the creditor had no legal claim against the property, but only an equitable right, and therefore equitable principles apply (*h*).

Funds to which right extends

An executor's right of retainer extends only to funds actually or constructively in his possession.

As to funds in Court.

The right of retainer may be asserted notwithstanding there has been a decree for administration (*i*), and where money instead of being paid to the executor is paid into Court under an order in the administration action it is as if the executor himself had received the money and had been ordered to pay it into Court. The Court never allows an order for payment into Court to prejudice the rights of the person paying it in, and the fund is treated as being in the possession constructively of the executor to enable him to exercise a right of retainer out of the fund (*k*).

But where the insolvent estate, the subject of an old administration suit, became entitled to a fund in Court to the credit of another suit, and the fund was transferred from the one credit to the other, it was held that the executor could not be treated as having had the fund constructively in possession, and that there could be no right of retainer out of it (*l*).

(*f*) *Re* Illidge, (1884) 27 C. D. 478, 482.

(*g*) *Re* Poole's Estate, (1877) 6 C. D. 739.

(*h*) See *post*, p. 393.

(*i*) Nunn *v.* Barlow, (1824) 1 S. & S. 588; Davies *v.* Parry, [1899] 1 Ch. 602; *Re* Belham, [1901] 2 Ch. 52.

(*k*) Richmond *v.* White, (1879) 12 C. D. 361; *Re* Langley, (1899) W. N. 23.

(*l*) Pulman *v.* Meadows, [1901] 1 Ch. 233.

The Court will not order a fund to be paid out to the executor or administrator having the legal title to a statute barred debt merely in order to enable him to acquire a right of retainer thereout (*m*).

Right not lost by order for administration.

The executor's right to retain may, like any other, be lost, forfeited, or released, but his right is not relinquished by himself, as plaintiff, suing on behalf of himself and all other the creditors, and submitting to account in the ordinary form and to an order that the estate shall be applied in payment of debts in a due course of administration (*n*).

No right of retainer out of assets collected by receiver in the action.

After a receiver is appointed there is no right of retainer out of assets collected by the receiver, but if the executor had received assets before the appointment of a receiver his right of retainer is not lost by the fact that he afterwards paid over the same to the receiver (*o*).

Court will not interfere with right by appointing receiver on interlocutory application.

The Court will not interfere with the right of retainer by appointing a receiver on interlocutory application before decree in an administration action, where it is not shown that the assets are in danger of being wasted (*p*).

Right not lost by order under s. 125 of the Bankruptcy Act, 1883.

The executor's right is not lost by an order made under s. 125, ss. 1, 2, of the Bankruptcy Act, 1883, for the administration of the estate of an insolvent testator, since the effect of the order is to vest in the official receiver the balance of the assets after the executor has retained his debts ; and if an executor, not knowing his rights, has paid over the whole of the assets to the trustee in the bankruptcy and has proved for his debt, so long as the trustee as the officer of the Court still has the money in hand he will be ordered to repay the amount the executor was entitled to retain on the executor withdrawing his proof (*q*).

Right not lost by mere delay so long as there are assets available.

Mere delay does not affect the executor's right to retain, provided the delay can be explained, and there are assets against which he can exercise his right ; since the general

(*m*) Trevor *v.* Hutchins, [1896] 1 Ch. 844.

(*n*) *Ex parte* Campbell, (1880) 16 C. D. 198.

(*o*) *Re* Harrison, (1886) 32 C. D, 395.

(*p*) *Re* Wells, (1890) 45 C. D. 569 ; see *post*, p. 404.

(*q*) *Re* Rhoades, [1899] 2 Q. B. 347.

law is that any person claiming to be a creditor is allowed to come in and prove on reasonable terms at any time, so long as there is anything against which his proof can usefully be established (*r*). An executor is not bound to assert his right before occasion arises (*s*).

What amounts to waiver of the right.

An executor may, however, lose his right where the exercise of it would be to defeat an inquiry directed as to the persons interested in a fund in Court which had been directed in his presence (*t*).

Right has priority over costs of administration action,

also over debt of higher degree of which executor had no notice at time of distribution.

The right of retainer has priority over the costs of the administration action (*u*); and when an estate has been fully distributed *bonâ fide* and without undue haste the right will prevail as against a debt of a higher degree of which the executor has no notice at the time of distribution (*x*).

Right to receive and liability to pay must be centred in same person.

The right of retainer exists where the right to receive the debt and the liability to pay the same are centred in the same person. In *Cockroft* v. *Black* (*y*), an executrix being entitled beneficially to the debt due from the testator was allowed to retain, although there was in existence a trustee of the debt for her. But it was laid down in *Re Dunning* (*z*) that the right established by this decision ought to be adhered to, but it ought not to be extended to a case where the executrix claimed the right on behalf of her life interest and also on behalf of her children out of the estate of a testator who had misappropriated the settlement funds, there being trustees of the settlement who were competent and bound to sue for and obtain judgment against the executrix for the amount, or to take proceedings for administration of the estate.

So an administrator who is an undischarged bankrupt has no right to retain a debt due to him from the deceased intestate (*a*).

Retainer for debts of which executor is trustee.

An executor or administrator may, however, retain not

(*r*) *Re* Giles, [1896] 1 Ch. 956.
(*s*) *Re* Rhoades, [1899] 2 Q. B. 347.
(*t*) Trevor *v.* Hutchins, [1896] 1 Ch. 844.
(*u*) Richmond *v.* White, (1879) 12 C. D. 361.
(*x*) *Re* Fludyer, [1898] 2 Ch. 562.
(*y*) (1725) 2 P. Wms. 299.
(*z*) (1885) 54 L. J. Ch. 900; see also *Re* Hayward, [1901] 1 Ch. 221.
(*a*) Wilson *v.* Wilson, [1911] 1 K. B. 327.

only the debts which he claims beneficially but also for those to which he is entitled as trustee (*b*).

Personal representative of deceased trustee, unless he elect to act as trustee, cannot be compelled to exercise right.

A personal representative of a deceased trustee has an absolute right to decline to accept the position and duties of trustee if he choses so to do (*c*), and unless he elects to act as trustee he cannot be ordered to exercise in favour of the *cestuis que trust* his right of retainer ; since the right of an executor to retain is not a right which he holds on trust, but is a personal privilege of his own (*d*). If, however, the legal personal representative is trustee he is compellable to exercise this right, because his position as trustee for the *cestuis que trust* is superadded to his position as legal personal representative of the deceased trustee (*e*).

One of two executors who is one of two joint creditors may retain.

One of two executors who is also one of two joint creditors has a right of retainer in respect of his joint debt, and it makes no difference that the creditor asserting the right is a trustee with the other creditor, since as trustee he is bound to exercise the right if the *cestuis que trust* require him to do so (*f*).

One of two cannot retain to the prejudice of the other.

Where there are co-executors or co-administrators, each being a creditor of the deceased, the one cannot retain for his own debt to the prejudice of the other ; for several joint executors or administrators are considered but as one person in law ; the possession of one is the possession of the other ; the receipt of one is the receipt of the other ; and, therefore, the retainer of one must be considered as the retainer of the other, and must enure, for their mutual benefit, in the discharge of the debts of both in proportion (*g*).

Mortgagee becoming executor for mortgagor has no preference for an unsecured debt.

Where a mortgagor dies insolvent, and the mortgagee then realises his security and, after paying himself the mortgage debt out of the proceeds, has a surplus in his hands, he

(*b*) Williams (10th ed.) 791 ; Sander *v.* Heathfield, (1874) L. R. 19 Eq. 21, 26 ; Davies *v.* Parry, [1899] 1 Ch. 602, 605.

(*c*) Legg *v.* Mackrell, (1860) 2 D. F. & J. 551 ; and see *ante*, p. 4.

(*d*) *Re* Benett, [1906] 1 Ch. 216.

(*e*) Davies *v.* Parry, *ubi sup.*, at p. 607.

(*f*) Crowder *v.* Stewart, (1880) 16 C. D. 368 ; *Re* Hubback, (1885) 29 C. D. 934.

(*g*) Williams (10th ed.) 796.

cannot retain that surplus in payment of a simple contract debt due to him from the mortgagor and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate ; the mortgagee being merely in the position of a bare trustee of the surplus for the estate. And if the mortgagee in such a case happens to be the executor of the mortgagor, still he cannot, under an executor's general right of retainer or preference, retain the surplus in payment of the simple contract debt, whether the debt is due to himself individually or to a partnership of which he happens to be a member. The mere possession of assets gives no right of preference to a creditor (*h*).

Executor having legal preference may exercise it on behalf of a firm of which he is a partner.

But where the executor has a legal preference, he can exercise that right on behalf of a firm of which he is a partner and accordingly retain on behalf of himself and partners (*i*), but should he die before exercising the right, since the legal interest in the debt thereupon devolves on the surviving partner, the right of retainer no longer exists (*k*).

No retainer for debt acquired by assignment after testator's death.

Where a creditor had proved his debt in an administration action and then died having bequeathed the debt to the executrix of the testator in the cause, it was held that she had no right of retainer in respect of it (*l*). The reason for allowing a retainer, viz., that the executor cannot sue himself and should in consequence be allowed a preference, would seem to have no application to such a case ; nor to the case of an executor acquiring by assignment a debt after his testator's death. The Judicature Act, 1873, s. 25 (6), makes the assignment of a chose in action carry the right for the assignee to sue in his own name, subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed (*m*).

(*h*) Talbot *v.* Frere, (1887) 9 C. D. 568 ; and see *Re* Gedney, [1908] 1 Ch. 804.

(*i*) Per Wigram, V.-C., in Burge *v.* Brutton, (1843) 2 Hare, 373, 376 ; and per Jessel, M.R., in Talbot *v.* Frere, *ubi sup.*, at p. 575.

(*k*) Burge *v.* Brutton, *ubi sup.*

(*l*) Jones *v.* Evans, (1876) 2 C. D. 420.

(*m*) Cf. *Re* Milan Tramways Co., (1884) 25 C. D. 587.

Executor being surety of testator may retain.

Where an executor was surety for the testator, and pays the debt after the testator's death, it becomes a simple contract debt due from the testator to him, which he is at liberty to pay himself or retain (*n*).

The right of indemnity belonging to an executor who is surety for an unpaid debt of his testator, creates an equitable debt in respect of which the executor may exercise the right of retainer, and provision will be made for payment of the debt before the rest of the estate is distributed among the creditors *pro ratâ* (*o*).

Administrator *d. m. æ.* may retain for infant's debt.

In the case of an administration granted during the minority of an infant next-of-kin, if the infant in point of right had a title to retain, the administration being granted to another during his minority will not prejudice that right (*p*).

So administrator for use of a lunatic may retain for lunatic's debt.

The same principle applies to an administration granted to another for the use of a lunatic (*q*).

In the same cases the administrator, under the old form of bond, could have retained for his own debt also (*r*).

Executor may retain for a statute barred debt.

An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations; and on the same principle may have a right to retain his own just debt, although barred by the statute (*s*). This is a single exception to the general rule that it is a devastavit if an executor or administrator pay that which need not be paid, and it is not to be extended, and therefore an executor or administrator would commit a devastavit in paying a debt to a creditor who is prevented from enforcing it by the Statute of Frauds, and for the same reason cannot retain such debt if due to himself (*t*).

(*n*) Boyd *v.* Brooks, (1865) 34 Beav. 7, and on app. 34 L. J. Ch. 605.

(*o*) *Re* Giles, [1896] 1 Ch. 956; and see per North, J., in *Re* Binns, [1896] 2 Ch. 584, 588.

(*p*) Franks *v.* Cooper, (1799) 4 Ves. 763.

(*q*) *Ibid.*; and see Williams (10th ed.) 793.

(*r*) Williams (10th ed.) 793; and see *ante*, p. 377.

(*s*) Stahlschmidt *v.* Lett, (1853) 1 Sm. & G. 415; Hill *v.* Walker, (1858) 4 K. & J. 166; and see per Kekewich, J., in Budgett *v.* Budgett, [1895] 1 Ch. 202, 215, 216.

(*t*) *Re* Rownson, (1885) 29 C. D. 358.

If an executor, in the exercise of his discretion, pays a statute-barred debt he will be allowed the payment as against the devisees of real estate upon which other debts are in consequence thrown (*a*).

Executor has no priority for debts of testator for which he makes himself personally liable.

Although an executor may retain for his own debt out of legal assets, and is entitled to be recouped in full in priority to other creditors for sums he may advance in paying creditors, yet he has no priority in respect of debts of his testator for which he makes himself personally liable (*b*).

(*a*) Lowis *v.* Rumney, (1867) L. R. 4 Eq. 451.

(*b*) See *post*, p. 434.

CHAPTER XXVI.

OF THE DISTINCTION BETWEEN LEGAL AND EQUITABLE ASSETS.

Legal assets subject to rules of priority of creditors, equitable assets not.

With regard to the rules of priority among creditors, there is a distinction between legal and equitable assets. Legal assets are administered in accordance with the rules of priority already explained, but equitable assets are to be administered upon principles of equality without regard to legal priorities (*a*).

What are legal assets.

The general principle is that a Court of Law would treat as assets every item of property come to the hands of the executor or administrator which he has recovered, or had a right to recover, merely *virtute officii*, *i.e.*, being an executor, which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof (*b*).

Money payable under contract made by deceased.

In *Att.-Gen.* v. *Brunning* (*c*), a binding contract for sale of real estate had been entered into by a Mr. Hope, the owner of the estate, and the question was as to the liability of the purchase money, on his death, to probate duty. Lord Cranworth (*d*) said: "I think that Court [the Court of Exchequer] fell into an error in treating this money as being equitable assets. It is a sum which the executor would take as executor and which, therefore, would be legal assets in his hands. His right would not depend on anything contained in the Will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate; and what an administrator is entitled to recover as administrator, *virtute officii*, can never be equitable assets. In considering

(*a*) Chapman *v.* Esgar, (1853) 1 Sm. & G. 575; Bain *v.* Sadler, (1871) L. R. 12 Eq. 570.

(*b*) Per Kindersley, V.-C., in Cook *v.* Gregson, (1856) 3 Drew. 547, 549.

(*c*) (1860) 8 H. L. C. 243.

(*d*) At p. 258.

whether assets are legal or equitable, the question is not whether the money is recoverable through the agency of a Court of Equity or the agency of a Court of Law, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator. The portions of younger children charged on the family estate are generally only recoverable in equity, but they are certainly legal, not equitable assets. So, money due to a mortgagee in fee, when the mortgagee is not a creditor by covenant or otherwise, and where, therefore, there is no legal remedy." The Court decided that the assets, whether legal or equitable, if recoverable by virtue of the probate, were liable to probate duty.

Portion of deceased younger child.

Money due to mortgagee in fee.

So an equity of redemption of a chattel interest, whether real or personal, is legal assets, since by virtue of his office the personal representative of the mortgagor is entitled to come to Court to redeem (*e*).

Equity of redemption of chattel interest.

On the same principle a reversionary interest in a settled fund of personalty when it falls into possession and is received by the executor or administrator is distributable as legal assets (*f*).

Reversionary interest in settled fund.

But if lands were devised to executors to be sold, or devised to be sold by executors, for payment of debts and legacies the proceeds would be equitable assets (*g*).

What are equitable assets.

Land devised to be sold, for payment of debts.

Real estate made assets under 3 & 4 Will. IV. c. 104.

Real estate not charged with payment of debts is by 3 & 4 Will. IV. c. 104 made assets to be administered in Courts of Equity. But the Act gives no lien or charge on such real estate until a judgment for administration has been obtained (*h*). Moreover the widow's right to dower or free-bench is unaffected by the Act and has priority over

(*e*) Cook *v.* Gregson, (1856) 3 Drew. 147.

(*f*) Mutlow *v.* Mutlow, (1859) 4 De G. & J. 539.

(*g*) Att.-Gen. *v.* Brunning, (1860) 8 H. L. C. 243, 263; Bain *v.* Sadler, (1871) L. R. 12 Eq. 570.

(*h*) *Re* Moon, [1907] 2 Ch. 304. The plaintiff sues on behalf of all creditors: Worraker *v.* Pryer, (1876) 2 C. D. 109; and this should appear in the title of the action: *Re* Tottenham, [1896] 1 Ch. 628. The practice has continued the same notwithstanding s. 1 of the Land Transfer Act, 1897, but it would seem to be now unnecessary: *Re* James, [1911] 2 Ch. 348.

debts other than debts to which the land of the deceased is subject or liable within the meaning of s. 5 of 3 & 4 Will. IV. c. 105 (*i*).

Property appointed by Will under a general power.

In *Re Hadley* (*k*) the Court of Appeal held that property appointed by Will under a general power is legal assets of the testator, the donee of the power, as being distributable of right among the creditors and forming no part of the bounty of the testator, and vesting in the executor by virtue of his office without having to prove the existence of any debt. The question whether such property passes to the executor "as such" within the meaning of the Finance Act, 1894, does not seem to depend on the distinction between legal and equitable assets (*l*).

Separate property of a deceased married woman.

With regard to the separate property of a married woman, prior to and independently of the Married Women's Property Act, 1882, being a creature of equity, it follows that if she had a power to deal with it, she had the other power incident to property in general; namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors had not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities but by laying hold of the separate property, as the only means by which they can be satisfied (*m*). In this sense property to which a married woman was entitled for her separate use is treated as equitable assets and out of which the executor of the married woman has no right to retain in full his own debt as against other creditors (*n*). More accurately it is an instance of equitable doctrines being applied to an equitable claim (*o*).

(*i*) Spyer *v.* Hyatt, (1855) 20 Beav. 621.

(*k*) [1909] 1 Ch. 20, differing in this respect from Pardoe *v.* Bingham, (1868) L. R. 6 Eq. 485; *Re* Fearnsides, [1903] 1 Ch. 250, 256, per Swinfen Eady J., and Commissioners of Stamp Duties *v.* Stephen, [1904] A. C. 137, 140, per Lord Lindley.

(*l*) *Re* Hadley, *ubi sup.*; and see *ante*, p. 350.

(*m*) Per Ld. Cottenham in Owens *v.* Dickenson, (1840) Cr. & Ph. 48, 54.

(*n*) *Re* Poole's Estate, (1877) 6 C. D. 739.

(*o*) Cf. Harrison *v.* Kirk, [1904] A. C. 1, 7.

CHAPTER XXVII.

OF PAYMENTS WITHOUT AND WITH NOTICE OF CLAIMS AND RIGHT OF CREDITORS TO FOLLOW ASSETS.

SECT. 1.—*Payments without and with Notice of Claims.*

Payments without notice of debt of higher degree.

AN executor or administrator who pays creditors without notice of the existence of a creditor of higher degree is not liable to account for the sums so paid at the instance of that creditor (*a*).

Retainer without notice.

Inasmuch as an executor or administrator under the plea of *plene administravit* can put in evidence retainer by him of his own debt, so if *bonâ fide* and without undue haste he has distributed the assets and has fully administered, he is entitled to retain a debt due to himself against creditors of a higher degree of which he had no notice when he distributed the assets (*b*).

Query as to debts of record.

Prior to the statutes requiring registration of judgments executors and administrators had at their peril to take cognizance of debts of record on the principle that every one is presumed to have cognizance of the proceedings in the King's Courts (*c*). The effect of s. 3 of 23 & 24 Vict. c. 38 was that a judgment not docketed was to be considered only as a simple contract debt. But this Act is repealed by s. 5 of 63 & 64 Vict. c. 26, and it may be contended that the old rule is now revived (*d*).

Contingent debts.

It has already been stated that contingent debts cannot stand in the way of payments of debts of inferior degree (*e*).

Practice of the Court.

Moreover it is not the practice of the Court to retain funds

(*a*) Harman *v.* Harman, (1685) Show. (3rd ed.) 643.

(*b*) *Re* Fludyer, [1898] 2 Ch. 562.

(*c*) Williams (10th ed.) 781. Having regard to the doctrine of *lis pendens* it may be questioned whether there is any presumption as to pending proceedings, see Wigram *v.* Buckley, [1894] 3 Ch. 483.

(*d*) See *ante*, p. 366.

(*e*) *Ante*, p. 372.

in Court for the protection of a contingent future creditor, and it is unnecessary to do so for the protection of the executors, for they are sufficiently protected by the order of the Court in the administration of an estate. Consequently the Court will order distribution among the residuary legatees notwithstanding the possible future liability on shares in a limited company, and, since the company has not any right which is enforceable either at law or in equity until a call has been made, it has no *locus standi* to interfere to prevent the distribution (*f*).

Covenants under leases.

So also it has been held with regard to the liability under leases the covenantee has no equity to apply to have a fund set apart for his indemnity (*g*). For a long time it was the practice of the Court, where the property comprised in the lease did not of itself furnish a sufficient security, to set apart out of the residuary estate a reasonable sum to cover any liability which might in any reasonable probability arise by reason of a future breach (*h*); but it would seem that the authorities only show that it is necessary to set apart a fund for the indemnity of the personal representative when there is privity of estate between him and the lessor; and except in such a case a fund ought not to be retained to the detriment of the beneficiaries (*i*).

Without order of Court legacies cannot be paid with notice of possible liability.

But except under an order of the Court an executor or administrator cannot safely make payment of legacies with notice of even a possible liability, such as a contingent liability in respect of shares retained unsold (*k*).

Except under s. 27 of 22 & 23 Vict. c. 35, on sale of leaseholds,

However, by virtue of s. 27 of 22 & 23 Vict. c. 35 (Lord St. Leonards' Act), where an executor or administrator has sold leaseholds and shall have satisfied all such liabilities under the lease or agreement for a lease as may have accrued due, and been claimed, up to the time of the assignment, and shall

(*f*) *Re* King, [1907] 1 Ch. 72.

(*g*) King *v.* Malcott, (1852) 9 Hare, 692.

(*h*) Dodson *v.* Sammell, (1861) 1 Dr. & S. 577; and see Hardy *v.* Fothergill, (1888) 13 App. Cas. 351, 370.

(*i*) *Re* Nixon, [1904] 1 Ch. 638.

(*k*) Taylor *v.* Taylor, (1870) L. R. 10 Eq. 477; *Re* Bewley's Estate, (1871) 24 L. T. 177; and see *post*, p. 674.

have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, he may distribute the residuary personal estate of the deceased without appropriating any part or further part (as the case may be) to meet any further liability, and shall not be personally liable in respect of any subsequent claim under the lease or agreement for a lease, but without prejudice to the right of the lessor or those claiming under him to follow the assets. The assignee under this section must be a person who has paid value for the lease. The section does not apply where the executors make a payment to the assignee as consideration for taking over the lease and the usual covenant for indemnity (*l*).

and under s. 28 in respect of conveyance on chief rent or rent-charge.

By s. 28 similar provisions are made as to the liability of an executor or administrator to the rent, covenants or agreements contained in any conveyance on chief rent, or rent-charge, or agreement for such conveyance.

Necessity to advertise for claims before distributing.

It would seem that the mere circumstance of want of notice of a debt or claim will not excuse an executor or administrator from the payment or satisfaction of it, if the assets were originally sufficient for the purpose, notwithstanding that in ignorance of the existence of the debt or claim he has *bonâ fide* handed over the assets to legatees or parties entitled in distribution, and before the Act next mentioned, no executor or administrator could safely distribute the assets except under the direction of the Court (*m*).

However, s. 29 of 22 & 23 Vict. c. 35 provides that :—

" Where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall,

(*l*) *Re* Lawley, [1911] 2 Ch. 530.
(*m*) Williams (10th ed.) 1082 ; and per Malins, V.-C., in Clegg *v.* Rowland, (1866) L. R. 3 Eq. 368, 371.

at the expiration of the time named in the said notices or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of the distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively."

Right of creditors to follow assets not prejudiced.

Act no protection against claims of which representative has notice.

In order, however, to protect an executor or administrator it is essential that he should have no notice of any claim which, at the time of the distribution of the assets, is left unsatisfied (*n*).

What sufficient advertisement.

In determining whether executors have given such notices as are sufficient to entitle them to the protection of s. 29, the Court will have regard to the circumstances of the particular case, such as the place of residence of the deceased and his position in life. For instance, where the deceased was a farmer in a small way the insertion of the advertisement in the local newspapers and in the *London Gazette* was held to be amply sufficient. It would seem that according to the practice there must be an advertisement in the *London Gazette*, and as to whether there should be other advertisements in other London papers, that must be decided by the circumstances of the case. In the absence of any special circumstances the period of a month from the date of the notice for the bringing in of claims is sufficient (*o*).

Rules as to claims in administration actions.

Where the estate is being administered by the Court the following rules apply :—

Ord. 55, r. 44, provides that " where a judgment or order

(*n*) Per Baggallay, L.J., in Hunter *v.* Young, (1879) 4 Ex. Div. 256, 263.

(*o*) *Re* Bracken, (1889) 43 C. D. 1; Ord. 55, rr. 44—61 deal with advertisements for creditors and claimants in administration actions.

is given or made, whether in Court or in Chambers, directing an account of debts, claims, or liabilities, or an inquiry for heirs, next-of-kin, or other unascertained persons unless otherwise ordered, all persons who do not come in and prove their claims within the time, which may be fixed for that purpose by advertisement, shall be excluded from the benefit of the judgment or order."

And rule 57 provides that " after the time fixed by the advertisement no claims shall be received (except as hereinbefore provided in case of an adjournment), unless the judge at Chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit."

When creditor may come in after time elapsed for receiving claims.

Where, however, there are general assets in Court applicable to the payment of a creditor's debt, such creditor with a legal right of action, according to the well established practice, is allowed to come in and share in those assets which still remain, subject to terms, notwithstanding the appointed time for coming in has long elapsed, and he can only be precluded by showing that he has in some way either released or abandoned his claim (*p*).

The same rule applies in the administration of an insolvent estate, where s. 10 of the Judicature Act, 1875, applies. The creditor may come in and prove at any time if there are assets undistributed, and if no injustice would be caused (*q*).

SECT. 2.—*The right of Creditors to follow Assets after Distribution.*

Distinction between creditor asserting legal right to be paid and equitable right to follow assets in hands of legatees.

There is a distinction between the case where there is still remaining in Court a residue or a fund legally applicable to the payment of debts and the case where the whole estate has been distributed, and it is necessary, in order to obtain payment, for the creditor to get back from the legatees or others, who have been paid, the money which has been paid to them. In the first case the creditor is exercising merely a legal right. In the other he is exercising an equitable right which is given

(*p*) Harrison *v.* Kirk, [1904] A. C. 1. (*q*) *Re* McMurdo, [1902] 2 Ch. 684.

him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees ; he has no legal right against the residuary legatees ; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of Court or in Court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next-of-kin who derive title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim (*r*).

In *Ridgway* v. *Newstead* (*s*) there was a fund in Court, but it was insufficient for the payment of the creditors who desired to prove, and there were also sums standing to the credit of infant legatees. Stuart, V.-C., admitted without question the right of the creditor to come in and take the benefit of the decree and prove as regards the residuary estate which still remained undistributed ; but as regards the right which he claimed to obtain payment out of sums which had been carried to the credit and appropriated for the payment of the legacies of certain infant legatees, he disallowed the claim on the ground that there was an equitable defence of laches or acquiescence or conduct of that kind.

Legal personal representatives should not be made party to proceedings by creditors against legatees.

In actions by creditors against legatees where the legal personal representatives are no longer liable, they ought not *quâ* legal personal representatives to be made parties to the proceedings. An executor who has retained any legacies as trustee, after appropriating them for the benefit of the *cestui que trust* is no longer under any liability *quâ* executor, although he may be liable, and may be a necessary party in his character as trustee (*t*).

(*r*) Per Ld. Davey in Harrison *v.* Kirk, [1904] A. C. 1, 7.

(*s*) (1860) 2 Giff. 492, affirmed 3 De G. F. & J. 474 ; referred to with approval in Harrison *v.* Kirk, *ubi sup.* As to what may amount to laches see Mohan *v.* Broughton, [1899] P. 211.

(*t*) Clegg *v.* Rowland, (1866) L. R.

Right of creditor against fund carried to separate account to answer legacy or share of residue.

Where, after the estate has been administered and distributed by the Court, a creditor comes in and claims to prove against a fund carried to a separate account to answer a legacy or share of residue, he will not be entitled out of that fund to the whole of the debt, but only a part of it, bearing the same proportion to the whole as the fund in Court, if a legacy, bore to the whole amount of the legacies, or, if a share of residue, to the whole amount distributed (*u*).

Distinction where estate was distributed out of Court.

In *Davies* v. *Nicholson* (*x*), where an estate had been administered by an executor out of Court, and he had assented to the specifically bequeathed property, and had allowed the residuary legatees to take possession of the rest of the property, it was contended, on the authority of *Gillespie* v. *Alexander* and *Greig* v. *Somerville* (*y*), that a specific legatee was only liable to contribution, and that there could not be any decree against him if the personal estate, not specifically bequeathed, come to the hands of the executor had been sufficient to pay the debts ; but it was held that those cases did not apply, for the Court there had distributed the assets, and the creditors could not impugn what had been done except by coming to the Court and submitting to such equitable terms as the Court might think fit to impose, and that there is a distinction where the Court has only to deal with the legal rights of the creditors, and consequently the property specifically bequeathed was not discharged from its liability.

Where an undischarged bankrupt died, leaving property acquired after the bankruptcy, and his administrator, without notice of the bankruptcy, distributed the property among the bankrupt's next-of-kin before the trustee in bankruptcy intervened, it was held that the administrator was protected by the administration bond from personal liability, but that the next-of-kin must refund to the trustee the shares they had respectively received (*z*).

3 Eq. 368, applied by C. A. in Hunter *v.* Young, (1879) 4 Ex. Div. 256.

(*u*) Gillespie *v.* Alexander, (1826) 3 Russ. 130 ; Greig *v.* Somerville, (1830) 1 Russ. & My. 338.

(*x*) (1858) 2 De G. & J. 693.

(*y*) *Ubi sup.*

(*z*) *Re* Bennett, [1907] 1 K. B. 149.

Legal right, not statute barred, can be enforced against all the assets so long as property remains in hands of a volunteer claiming under the deceased.

Although the right of mortgagees of real estate, whose security proves insufficient, to come against the residuary legatees of the mortgagor, amongst whom his personal estate has been distributed, is a purely equitable right, and the Court will not enforce it if there are circumstances which would make it inequitable to do so (*a*), yet the right of an unsatisfied mortgagee to come against other real estate specifically devised or descended, and not included in his security, either under a covenant in which the heirs are bound or as being assets under 3 & 4 Will. IV. c. 104, is a legal right, and can be enforced so long as the debt is not statute barred and the property remains in the hands of volunteers claiming under the testator or intestate (*b*). But the Court will not allow the creditor to follow the assets into the hands of a *bonâ fide* assignee for value ; so that if the specific devisee, whether legal or equitable owner, and whether of the whole estate of the testator or of a particular estate or interest in the land devised, has sold or mortgaged the property devised to him, it cannot be reached in the hands of the purchaser or mortgagee (*c*).

So also assets of a testator, settled *bonâ fide* on the marriage of the residuary legatee, are no longer liable to the claims of creditors of the testator, although they might have been reached if they had passed into the hands of a volunteer (*d*).

(*a*) Blake *v.* Gale, (1886) 32 C. D. 571.

(*b*) *Re* Lacey, [1907] 1 Ch. 330; and see *post*, p. 449 ; *Re* Eustace, [1912] 1 Ch. 561.

(*c*) Coope *v.* Cresswell, (1866) L. R. 2 Ch. 112, 122, per Ld. Chelmsford : That case was decided with regard to 3 Will. & M. c. 14, which is re-enacted by 1 Will. 4, c. 47, and it has been held that the operation of the statute 3 & 4 Will. 4, c. 104 is the same ; see British Mutual Investment Co. *v.* Smart, (1875) L. R. 10 Ch. 567 ; *Re* Hedgely, (1886) 34 C. D. 379 ; Price *v.* Price, (1887) 35 C. D. 297, 305 ; *Re* Atkinson [1908] 2 Ch. 307.

(*d*) Dilkes *v.* Broadmead, (1860) 2 Giff. 113 ; and see Graham *v.* Drummond, [1896] 1 Ch. 968.

CHAPTER XXVIII.

OF THE EFFECT OF DECREES FOR ADMINISTRATION.

A DECREE for administration of assets is in the nature of a judgment for all creditors, and may be pleaded at law to an action by a creditor and stops all proceedings after notice of the decree (*a*).

Decree for administration in the nature of a judgment for all creditors.

A creditor, however, who has obtained judgment against the executor before the administration order, will not be restrained from pursuing his remedy against the executor personally (*b*).

The order, once made, enures for the benefit of all creditors, even though the plaintiff may ultimately fail to establish any debt (*c*).

After judgment, the plaintiff in a creditor's administration action is precluded from discontinuing the action, since, if it is a proper judgment, it not only directs inquiries as to debts, etc., but also that the assets shall be applied "in a due course of administration." If there is not that direction as to the administration of assets, the decree is not an administration decree in the proper sense of the term, and actions at law cannot be restrained. But if that direction is given, they can be restrained, and for the reason that the Court has then taken upon itself the duty of administering the assets. Therefore, in a case like that, until there is a certificate that all the other debts have been paid, the plaintiff after decree is not *dominus litis;* he is, so to speak, a trustee of the action for the benefit of the other creditors (*d*).

After decree plaintiff is no longer *dominus litis* and cannot discontinue.

(*a*) Paxton *v.* Douglas, (1803) 8 Ves. 520.

(*b*) *Re* Womersley, (1885) 29 C. D. 557.

(*c*) *Re* Ross, [1907] 1 Ch. 482, 485.

(*d*) Per Kekewich, J., in *Re* Alpha Co. Ld., [1903] 1 Ch. 203, 205. For form of summons to stay proceedings see Dan. C. F. (5th ed.) p. 986; and for form of order as to costs where the debt is disputed, see King *v.* King, (1864) 34 Beav. 10; and see Seton

Decree merely affects the remedy.

It is, however, a fallacy to suppose that because the debt has to be proved, or the payment of the debt has to be enforced through the medium of the Court of Chancery, it becomes an equitable demand and ceases to be a legal demand. Its character is not altered: the only difference made is in the remedy by which the debt can be recovered (*e*).

Payments to creditors by personal representative after decree not allowed.

An executor or administrator will not be allowed payment to creditors made after a decree for administering the debtor's estate (*f*), and if he pays a creditor he does it at his own risk and is only entitled to stand in the place of the creditor against the estate (*g*).

Before judgment he may prefer.

But before judgment he may voluntarily pay a creditor in full, and will be allowed it in passing his accounts, even though he may have had notice of the commencement of a creditor's administration action (*h*).

Before judgment Court will not interfere with legal right to prefer.

There is no equity which entitles the Court to interfere by the appointment of a receiver before judgment for administration in order to interfere with the legal right of the executor or administrator to prefer one creditor to another. To obtain the appointment of a receiver a special case must be made of assets being wasted (*i*).

Difference between right to prefer and right to retain after judgment.

The right of the executor or administrator to prefer one creditor, and the right to retain his own debt, are in many respects the same thing in substance and principle; though no doubt the latter can, while the former cannot, be exercised after an administration decree (*j*).

Effect of order for an account.

An order in an administration action under Ord. XV., r. 1, merely for an account, and reserving further consideration, does not affect the right of creditors to sue, or

(7th ed.) p. 1380. A foreign creditor cannot be restrained from proceeding in a foreign Court against the administrator; *Re* Boyse, (1880) 15 C. D. 591.

(*e*) Harrison *v.* Kirk, [1904] A. C. 1, 5, per Ld. Davey.

(*f*) Mitchelson *v.* Piper, (1836) 8 Sim. 64.

(*g*) Irby *v.* Irby, (1857) 24 Beav. 525.

(*h*) *Re* Radcliffe, (1878) 7 C. D. 733; Vibart *v.* Coles, (1890) 24 Q. B. D. 364.

(*i*) Phillips *v.* Jones, (1884) 28 Sol. J. 360; Harris *v.* Harris, (1887) 35 W. R. 710; *Re* Wells, (1890) 45 C. D. 569.

(*j*) Per North, J., in *Re* Hankey, [1899] 1 Ch. 541; and see Nunn *v.* Barlow, (1824) 1 S. & S. 588.

the right to prefer creditors (*k*), or the legal priorities of creditors (*l*).

Personal representative not bound to plead Statute of Limitations.

In the administration of assets in a creditor's suit, the personal representative is not bound to plead the Statute of Limitations ; and if any person comes in and takes the benefit of a decree obtained by a creditor, whose claim would have been barred by the statute, he shall not be at liberty to set up the statute against the plaintiff, whose claim is the foundation of the decree ; but he may set up the statute as against any person other than the plaintiff, although the personal representative does not bring forward the objection (*m*).

When Statute may be set up against plaintiff's debt.

Where there is a contest the plaintiff has only to prove his debt once for all at the hearing, and in that case, if the statute has not then been successfully set up by the personal representative, he cannot set it up afterwards (*n*). But in a suit by one or more creditors on behalf of all, as every creditor has a right to question the claim of every other, because it may interfere with his own, and as all are not before the Court at the hearing, the plaintiff is called upon to prove his debt over again before the Master (*o*) ; yet, as already stated, if the personal representative will not set up the statute, it cannot be set up by any other creditor who comes in under the decree (*p*).

Distinction where creditor plaintiff claims to be paid out of real estate.

In a creditor's suit for administration, where the defendant, who was both executor and devisee in trust, had not set up the Statute of Limitations, it was held that as to the personal estate the residuary legatees could not set it up against the plaintiff ; but that as to the real estate, inasmuch as formerly the *cestuis que trustent* of devised estates would have been necessary parties to the suit instituted by the plaintiff, and might have set up the statute, they ought not to be put in a worse position in consequence of the Court and

(*k*) *Re* Barrett, (1889) 43 C. D. 70 T. 727.

(*l*) Nunn *v.* Barlow, *ubi sup.*

(*m*) Fuller *v.* Redman, (1859) 26 Beav. 614.

(*n*) Adams *v.* Waller, (1866) 14

(*o*) Owens *v.* Dickenson, (1840) Cr. & Ph. 48 ; referred to in Adams *v.* Waller, *ubi sup.*

(*p*) Fuller *v.* Redman, *ubi sup*

the Legislature having, for the purpose of saving expense, dispensed with their being parties (*q*).

In *Hunter* v. *Baxter* (*r*) it was held, in an action for the administration of real and personal estate, that where a judgment has been recovered against executors for a debt due from their testator, and they paid the debt, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up by them against the creditor who recovered the judgment.

Effect of s. 10 of Judicature Act, 1875.

The effect of s. 10 of the Judicature Act, 1875, where an insolvent estate is being administered under an order of the Court has already been considered (*s*), as well as the practice of the Court as to the distribution of assets notwithstanding contingent claims and the protection afforded to the personal representative by the order (*t*) ; also the right of creditors to follow the assets (*u*).

(*q*) Briggs *v.* Wilson, (1853) 5 De G. M. & G. 12, followed in *Re* Lacey, (1906) W. N. 213. It is, however, submitted that, having regard to the former practice stated in Mitford on Pleadings (5th ed.), pp. 202, 203, and the express enactment of s. 42 (9) of 15 & 16 Vict. c. 86 (1852), Briggs *v.* Wilson on this point, so far as relates to devised estates, may be questioned.

(*r*) (1861) 3 Giff. 214.

(*s*) *Ante*, p. 373.

(*t*) *Ante*, p. 395.

(*u*) *Ante*, p. 399.

CHAPTER XXIX.

OF LIABILITIES FOR WHICH THE PERSONAL REPRESENTATIVE MAY BE SUED.

SECT. I.—*Liability for the Acts of the Deceased.*

(1) *On Obligations Ex Contractu.*

Action for debt.

STAT. 3 & 4 Will. IV. c. 42, s. 14, first gave an action for debt on simple contract against an executor or administrator; prior thereto it was customary to bring an action upon the case upon the defendant's implied promise (*a*).

Action for account.

An action for account at law was first given against an executor or administrator by stat. 4 & 5 Ann. c. 16, s. 27 (*b*).

Claims arising from contract or other duty survive.

The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other duty, that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator (*c*).

Obligation may be implied.

It is not only where there is an express contract that a suit grounded on some default of the person whose representative is sued can be maintained; but if the position of the parties was such that the law of England would imply a contract from that position then on assumpsit the executor might still be held liable (*d*).

Instances of implied obligation: purchaser of equity of redemption;

Instances of implied obligation, in consequence of the position which the parties have undertaken one to another, are the obligation of the purchaser of an equity of redemption to indemnify the vendor against the mortgage debt (*e*);

(*a*) See Williams (10th ed.) 1566.

(*b*) *Ibid.*

(*c*) Williams (10th ed.) 1346; and see *ante*, p. 297.

(*d*) Per Cotton, L.J., in Batthyany *v.* Walford, (1887) 36 C. D. 269, 279.

(*e*) Waring *v.* Ward, (1802) 7 Ves. 332; Mills *v.* United Counties Bank, Ltd., [1912] 1 Ch. 231.

carrier and bailee; buyer and seller of shares; dilapidations of deceased rector or vicar; copyhold tenant; devisee subject to direction to repair; negligence of deceased solicitor.

of carriers and bailees; of the buyer of shares in a public company liable to calls to indemnify the seller from all liability in respect of them; the position of the rector or vicar which renders his personal representative after his death liable to be sued for dilapidations (*f*); of the copyhold tenant who accepts his tenancy upon the terms that he shall keep the premises in repair (*g*); of the devisee who accepts the devise subject to a direction in the Will to keep the premises in repair (*h*); of the solicitor whose executor is liable for negligence by the deceased in the conduct of his client's affairs (*i*).

Contracts personal to deceased.

No liability, however, attaches upon the executor or administrator where the contract is personal to the deceased and ceased on his death, unless the breach occurred in his lifetime (*k*).

On breach of promise of marriage special damage to property must be proved.

An action for breach of promise of marriage will not lie against personal representatives of a deceased promisor except for special damage to the property, and not to the person, of the promisee, and within the contemplation of both parties at the date of the promise (*l*).

Liability of personal representative of deceased master under apprenticeship deed.

Although on the death of a master, in the absence of special agreement, no action will lie by an apprentice or pupil for the recovery of any part of the premium paid under the indenture of apprenticeship, yet where the indenture contains a covenant for maintenance, the personal representative of the master is liable on the covenant as far as he has assets; and by the custom of London he is bound to put the apprentice to another master of the same trade (*m*).

Liability on covenants running with the land:

With regard to the liability of the personal representative

(*f*) Per Cotton, L.J., in Batthyany *v.* Walford, (1887) 36 C. D. 269, 279; and see *post*, p. 429.

(*g*) Blackmore *v.* White, [1899] 1 Q. B. 293; and see *post*, p. 429.

(*h*) *Re* Williames, (1886) 54 L. T. 105; and see *post*, p. 429.

(*i*) Wilson *v.* Tucker, (1822) 3 Stark. 154; Blyth *v.* Fladgate, [1891] 1 Ch. 337, 366.

(*k*) Farrow *v.* Wilson, (1869) L. R. 4 C. P. 744; and see *ante*, p. 297.

(*l*) Chamberlain *v.* Williamson, (1814) 2 M. & S. 408; Finlay *v.* Chirney, (1888) 20 Q. B. D. 494.

(*m*) Williams (10th ed.) 1402. As to the liability of the infant under an apprenticeship deed, see Gadd *v.* Thompson, [1911] 1 K. B. 304.

where the deceased was the covenantor ;

of a deceased person in respect of covenants which run with the land, where the deceased person was the covenantor, the personal representative is liable for any breach to the extent of the assets, although the deceased had parted with possession, since the privity of contract is not determined by the death of the covenantor or by assignment (*n*). But in respect of leasehold property and covenants in conveyances, the personal representative is entitled after assignment to a purchaser to the protection given by ss. 27 and 28 of 22 & 23 Vict. c. 35 (*o*).

where the deceased was not the covenantor but only assignee.

Where the deceased person was not the covenantor, but only assignee of the estate, if the covenant does not run with the land, but is in the category of collateral covenants, the deceased or his personal representative is not liable under it ; but if it is a covenant which runs with the land, the deceased or his personal representative is liable for breaches only during the continuance of his ownership or, in other words, the privity of estate (*p*).

Duty of personal representative where deceased was assignee of burdensome leaseholds.

In the case of burdensome leaseholds which the deceased person acquired by assignment, if the lessor refuses to accept a surrender it is the duty of the personal representative, if possible, to assign to a pauper to relieve the estate from further liability, but not to deprive the landlord of his legal remedies for rent due or breaches of covenant incurred previous to the assignment (*q*).

Liability for rent accrued in lifetime of deceased ;

With regard to arrears of rent accrued in the lifetime of the testator or intestate, the action to recover them must be brought against the personal representative in his repre-

(*n*) Williams (10th ed.) 1384 ; Page *v.* Midland Railway Co., [1894] 1 Ch. 11.

(*o*) See *ante*, p. 396. As to the form of covenant of indemnity a vendor selling subject to restrictive covenants may require from the purchaser, see *Re* Poole and Clarke's Contract, [1904] 2 Ch. 173 ; and as to the form of covenants on a decree against personal representatives for specific performance of a contract to take a lease, see *post*, p. 410.

(*p*) See Spencer's Case, (1582) 5 Rep. 16, and notes in Smith's Leading Cases (11th ed.) p. 55 ; also Dewar *v.* Goodman, [1907] 1 K. B. 612 ; [1908] 1 K. B. 94 ; and *ante*, p. 306. As to what amounts to a breach of covenant for quiet enjoyment, see Williams *v.* Gabriel, [1906] 1 K. B. 155.

(*q*) Onslow *v.* Corrie, (1817) 2 Madd. 330 ; Rowley *v.* Adams, (1839) 4 My. & Cr. 534.

sentative character; and the judgment will be *de bonis testatoris* (*r*).

for rent accrued after death.

But in an action of debt for rent accrued after the death of the lessee, if the personal representative enters upon the demised premises, the lessor has his election, either to sue him as executor or to charge him personally as assignee in respect of the perception of the profits (*s*).

So long as the assets hold out the personal representative must pay the rent and cannot waive the possession (*t*).

How personal representative may limit his liability to rent.

If the personal representative is sued in his representative character, by a proper plea, he will only be liable to the extent of the assets; but if he is sued as assign of the lease for the rent accrued during the time he was in possession, and the estate is insolvent, he is entitled to set up by way of defence that he is only assign as executor or administrator, and that the profits or yearly value of the property amount only to a sum less than the rent, and on payment into Court of what he admits to be the value, if his plea is proved, and that is the full value, he will be under no further liability. The liability for the rent reserved is to the extent to which he might by the exercise of reasonable diligence have derived profit or advantage from the premises (*u*): that is, he is liable in respect of the period during which he is in possession for the same sum as a trespasser for the same period would be liable for as mesne profits (*x*).

Cannot limit liability for breach of covenant to repair.

But it would seem that a personal representative who takes possession can only limit his liability in respect of rent, and not in respect of breach of contract to repair (*y*).

Form of covenants when ordered to accept a lease.

Where specific performance of a contract to take a lease, entered into by a person since deceased, is ordered against his personal representatives, the covenants must be so

(*r*) Williams (10th ed.) 1388.
(*s*) *Ibid.*
(*t*) *Ibid.*, 1393.
(*u*) *Re* Bowes, (1887) 37 C. D. 128; Rendall *v.* Andreæ, (1892) 61 L. J. Q. B. 630.
(*x*) Whitehead *v.* Palmer, [1908] 1 K. B. 151, 158.
(*y*) Williams (10th ed.) 1394; Rendall *v.* Andreæ, *ubi sup.* As to the construction of such covenants in respect of the liability of the lessee, see Lurcott *v.* Wakely and Wheeler, [1911] 1 K. B. 905.

framed that no personal liability shall be incurred by them (*z*).

Liability of personal representative of deceased shareholder.

The liability of the personal representatives of a deceased shareholder for moneys payable on shares in a public company registered under the Companies Act, 1862, or the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), is regulated by s. 126 of the Act of 1908.

If once shares are put into the names of personal representatives individually, although they have a right of indemnity against the estate, they are liable personally to the company (*a*), and unless retained at the request of *cestuis que trustent*, who are *sui juris* and sole beneficial owners, they would seem to have no right to indemnity by the beneficiaries personally (*b*).

Except in the event of a company being wound up the liability is not a debt until a call is made (*c*). But as already mentioned (*d*), the personal representative, if he distribute the estate among the beneficiaries with notice of the contingent liability, remains liable to the company in respect of the shares retained unsold to the extent of the assets so distributed (*e*), unless the distribution is made under the order of the Court (*f*); but in the case of distribution without such an order, he will be entitled to indemnity out of the deceased's estate for what he may be called upon to pay, and to recover back the assets from the beneficiary (*g*).

Under s. 126 of the Act of 1908 (substituted for s. 105 of the Act of 1862), if the personal representative of a deceased contributory makes default in payment of any sum ordered to be paid by him, proceedings may be taken for administration of such deceased contributory's estate, and compelling payment thereout of the moneys due.

(*z*) Stephens *v.* Hotham, (1855) 1 K. & J. 571.

(*a*) *Re* Cheshire Banking Co., (1885) 32 C. D. 301, 309.

(*b*) See Fraser *v.* Murdoch, (1881) 6 App. Cas. 855, 872; Hardoon *v.* Belilios, [1901] A. C. 118.

(*c*) Whittaker *v.* Kershaw, (1890) 45 C. D. 320.

(*d*) *Ante*, p. 396.

(*e*) Taylor *v.* Taylor, (1870) L. R. 10 Eq. 477.

(*f*) *Re* King, [1907] 1 Ch. 72.

(*g*) Jervis *v.* Wolferstan, (1874) L. R. 18 Eq. 18.

Position of representative of deceased shareholder as to being registered as member of the company: under the Companies Act, 1862;

The personal representative of a deceased shareholder in a company registered under the Act of 1862 or the Act of 1908 may either have the shares transferred into his own name and become to all intents and purposes a member of the company, or will be allowed a reasonable time to sell the shares and produce a purchaser who will take a transfer of them. Simply notifying to the company that he is executor or administrator is not sufficient authority to the company to put his name upon the register in such a way as to make him personally liable (*h*). The executor or administrator is, however, entitled, if he thinks fit, to have his name entered upon the register without any reference to his representative capacity (*i*).

Where articles of association contain no clause authorising directors to reject a transferee, a shareholder may before liquidation, and for the express purpose of escaping liability, transfer his partly-paid shares to a transferee, even to a pauper, and may compel registration, provided it be an out-and-out transfer reserving to the transferor no beneficial right to the shares direct or indirect (*k*).

under the Companies Clauses Act, 1845.

With regard to shares of railway and other companies subject to the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), the personal representative may either leave the shares alone, outstanding in the name of the deceased shareholder, the consequence being he could neither transfer the shares, nor vote in respect of them, nor receive dividends on them, and would only be liable to calls in his representative capacity ; or, if he wants to deal with the shares, or to receive the dividends in respect thereof, he must avail himself of the machinery given by the 18th section of the Act and procure himself to be registered as a shareholder (*l*).

Position of joint contractors.

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or

(*h*) Buchan's Case, (1879) 4 App. Cas. 549.

(*i*) *Re* T. H. Saunders & Co., Ltd., [1908] 1 Ch. 415.

(*k*) *Re* Discoverers Finance Corporation Ltd., [1910] 1 Ch. 312.

(*l*) Barton *v.* London and North Western Railway Co., (1889) 24 Q. B. D. 77, 88, per Lindley, L.J.

administrator is at law discharged from all liability, and the survivor or survivors alone can be sued (*m*).

There is in the cases of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement. The cause of action when pursued to a judgment against one of the joint debtors is absorbed and merged in the judgment not only as against him but as against all the rest (*n*). And where both joint debtors were originally made defendants to and entered appearance in the same action, and judgment by consent is obtained against one of them in the action, such judgment is a bar to further proceedings against the other (*o*).

Effect of death of one of two joint judgment debtors.

Distinction between execution by *fi. fa.* and on *elegit.*

Where there are two or more defendants joint contractors in a personal action, and one or more of them dies within six years after joint judgment, execution by *fi. fa.* should be against the survivors only, and may be had against the survivors without obtaining leave for that purpose, but the writ must contain a suggestion of the death, so as to account for the omission of the deceased party's name. If the plaintiff wishes to proceed against the realty by *elegit* he must obtain leave to issue execution against the land of the survivor and the land of the deceased, as he cannot proceed as to the realty against the survivor alone. The reason for the distinction is that the judgment survives as to the personalty, but not as to the real estate; since under the Statute of Westminster 2 the execution on *elegit* must be equally made against the lands of all chargeable (*p*).

Leave to issue execution against the land of the deceased is obtained under Ord. 42, r. 23.

(*m*) Williams (10th ed.) 1367; White *v.* Tyndall, (1888) 13 App. Cas. 263.

(*n*) King *v.* Hoare, (1844) 13 M. & W. 494; and see *Re* Hodgson, (1885) 31 C. D. 177, 188, per Bowen, L.J.

(*o*) McLeod *v.* Power, [1898] 2 Ch. 295.

(*p*) 2 Saund. 51, n. (4); Notes to Saunders' Rep. (1871), vol. 2, pp. 236, 237; Chitt. Arch. (14th ed.) p. 961.

Right of contribution against representative of deceased joint contractor.

In a joint contract for the benefit of all each takes upon himself the liability to pay the whole debt at the implied request of each of the other co-contractors, and on the implied promise that each will contribute an aliquot part to the contractor who pays the entire debt, and an action for contribution will lie against the legal personal representative of the deceased co-contractor (*q*).

In the case of co-sureties until one has paid more than his due proportion of the entire debt he has no right of action against his co-surety to contribute (*r*).

Distinction between joint contractors and persons entitled to properties subject to an incumbrance.

There is a distinction between the right to contribution arising out of a joint contract and the right to contribution against persons becoming entitled as grantees or assignees to property subject to a liability under a contract. Where an incumbrance is a paramount charge, onerated with which all the estates originally came to the grantor, the principle of equality applies, and the grantor has the same right against purchasers from himself which they have *inter se*, *i.e.*, to resist the proceeding of the incumbrancer till he brings all in to share the common burthen. But the case of the debtor himself or his heir-at-law in respect of retained lands is an exception to that principle by reason solely of his personal liability, and to such exception it matters not whether the purchasers were such with consideration or without (*s*). So where a debtor owed a sum of money charged on certain property and made a voluntary assignment to his wife of the property and died, and on his death his executors paid off the debt, it was held that, the charge being one created by the assignor himself and not a charge paramount to his own title, the widow was under no liability to contribute (*t*).

Contract joint in form, but in substance joint and several:

Wherever a Court of Equity sees that in a contract joint in form the real intention of the parties was that it should be

(*q*) Herries *v.* Jamieson, (1794) 5 T. R. 556; Batard *v.* Hawes, (1853) 2 E. & B. 287, 297; and see Williams (10th ed.) 1378, 1414, and the observations of Ld. Halsbury in Ruabon Steamship Co. *v.* London Assurance, [1900] A. C. 6, 9.

(*r*) Stirling *v.* Burdett, [1911] 2 Ch. 418.

(*s*) Ker *v.* Ker, (1869) Ir. R. 4 Eq. 15.

(*t*) *Re* Darby's Estate, [1907] 2 Ch. 465.

joint and several, it will give effect to such intention; as for instance in the case of a joint bond where there has been a credit previously given to the different persons who have entered into the obligation, or where there was a joint and several liability independently of the contract (*u*). In such cases the Court looks at the substance of the contract in considering the construction of the instrument (*x*). But where there was no antecedent separate liability, but the obligation exists only by virtue of a joint covenant, the extent of its operation is measured by the words used, and the construction is the same in equity as at law (*y*). A joint loan does not create in equity a joint and separate liability (*z*); and it was accordingly held in *Kendall* v. *Hamilton* (*a*) that, on the principle of *King* v. *Hoare* (*b*), an action, and a judgment, against two persons who had borrowed money from the plaintiffs (though the judgment was unsatisfied), constituted a bar to another action brought by the same plaintiffs against a third person, who was afterwards discovered to have been really interested as a partner with the two debtors in the business for the purposes of which the money had been borrowed.

there must be antecedent separate liability to render representative of deceased liable.

As to partnership debts and mercantile contracts, instead of holding that the cases establish the principle that all partnership or mercantile contracts are for all purposes several as well as joint, it is more correct to say that relief was originally given in these cases as a consequence, which equity attributed to the rule *jus accrescendi inter mercatores locum non habet*, namely, that as the estate of the deceased, notwithstanding his death, retained an interest in the partnership property, his estate ought not to be protected or relieved by his death from liability in respect of contracts of

Principle on which partnership or mercantile contracts may be treated several as well as joint.

(*u*) See Williams (10th ed.) 1376 *et seq.*

(*x*) Beresford *v.* Browning, (1875) 1 C. D. 30, 34.

(*y*) Levy *v.* Sale, (1877) 37 L. T. 709; White *v.* Tyndall, (1888) 13 App. Cas. 263.

(*z*) Jones *v.* Beach, (1852) 2 De G. M. & G. 886.

(*a*) (1879) 4 App. Cas. 504.

(*b*) (1844) 13 M. & W. 494; *ante*, p. 413.

which it still retained the benefit, and that to this extent partnership contracts were to be considered several; or, in other words, that in partnership contracts, of which the profit does not go exclusively to the survivors, there is in the view of a Court of Equity an implied stipulation that in the event of the death of any of the contractors his estate shall still remain liable, and that in this way the estate of each partner is in equity severally liable (*c*). The expression that a partnership debt is in equity joint and several is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts took place in the administration of the assets either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a Court of Law the debts of the survivors; but the survivors, on the other hand, in a Court of Equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right through the surviving partners, to come for payment against the assets of the deceased partner (*d*).

Conditions imposed on creditor enforcing remedy against estate of deceased partner.

The Court has imposed two conditions with regard to enforcing the remedies against the estate of a deceased partner. In the first place the partnership debts are postponed to the separate deeds of the deceased partner, since partnership debts are paid first out of partnership assets and it is only from what remains that anything can flow to the separate estate of

(*c*) Kendall *v.* Hamilton, (1878) 3 C. P. D. 403, 408, per Cotton, L.J.

(*d*) Kendall *v.* Hamilton, (1879) 4 App. Cas. 504, 517, per Ld. Cairns.

the deceased partner; and in the second place the Courts have required the presence of the surviving partner in some manner at the taking of the accounts of the partnership (*e*).

Concurrent remedies against surviving partner and estate of deceased partner.

The creditor of a partnership firm has concurrent remedies against the estate of the deceased partner and the surviving partner, and it makes no difference which remedy he pursues first (*f*).

Partnership Act, 1890.

Sect. 9 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), now expressly provides that every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

By s. 33 (1), subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death of any partner.

By s. 36 (3) the estate of a partner who dies is not liable for partnership debts contracted after the date of the death; and by s. 14 (2), where the partnership is continued in the old firm-name, the continued use of that name, or of the deceased partner's name as part thereof, shall not of itself make his executors or administrators, estate or effects, liable for any partnership debts contracted after his death.

Limited Partnerships Act, 1907.

By the Limited Partnerships Act, 1907 (*g*), as to limited partnerships established under that Act, a limited partner, so long as he does not take any part in the management of the partnership business, is not liable for the debts or obligations of the firm beyond the amount contributed by him.

Liability of personal representative of deceased guarantor.

As to whether a liability under a guarantee ceases on the death of the guarantor or not is a question of construction of the contract.

(*e*) *Re* Hodgson, (1885) 31 C. D. 177, 192, per Fry, L.J.

(*f*) *Re* Hodgson, *ubi sup.*

(*g*) 7 Edw. 7, c. 24; see *ante*, p. 230.

Two classes of continuing guarantees.

There would seem to be two classes of continuing guarantees :—

First, where the consideration for the guarantee is given once for all and is entire ; as where in consideration of the lessor granting a lease to a third party the guarantor will be answerable for the performance of the covenants, or in consideration of taking an individual into service in a responsible position the guarantor will be answerable for his fidelity as long as he continues in that service—in that case the guarantee does not cease on the death of the guarantor (*h*).

Secondly, where the consideration is fragmentary, supplied from time to time, and therefore divisible ; as where the guarantee is given to secure the balance of a running account at a banker's, or a balance of a running account for goods supplied—in which case, unless it is stipulated to the contrary, the guarantor may at any time terminate the guarantee (*i*).

In the latter class of cases the mere fact of death does not determine the guarantee (*k*), but it would seem that, in the absence of stipulation to the contrary, notice of the death of the guarantor is to be considered to be notice to terminate the guarantee (*l*). But where the contract provides for a notice of a definite period to be given before terminating the guarantee, mere notice of death only would not be sufficient, but notice determining the liability must be given in accordance with the contract (*m*), unless the circumstances show that after the death the parties dealt together on the footing that the guarantee was at an end (*n*).

Partnership Act, 1890, s. 18.

Sect. 18 of the Partnership Act, 1890, provides that : " A continuing guaranty or continuing obligation given either to a firm or to a third person in respect of the transaction of a firm is, in the absence of agreement to the contrary, revoked

(*h*) Lloyds *v.* Harper, (1880) 16 C. D. 290 ; *Re* Crace, [1902] 1 Ch. 733.

(*i*) Coulthart *v.* Clementson, (1879) 5 Q. B. D. 42, 46 ; Lloyds *v.* Harper, *ubi sup.*

(*k*) Bradbury *v.* Morgan, (1862) 1 H. & C. 249.

(*l*) Coulthart *v.* Clementson, *ubi sup.* ; *Re* Whelan, deceased, [1897] 1 I. R. 575.

(*m*) *Re* Silvester, [1895] 1 Ch. 573 ; and see per Joyce, J., in *Re* Crace, *ubi sup.*, at p. 739.

(*n*) Harris *v.* Fawcett, (1873) L. R. 8 Ch. 866.

as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given."

Liability of personal representative of deceased husband for wife's ante-nuptial debts.

It would seem that to the extent to which a husband at his death is liable for his wife's ante-nuptial debts, to the same extent his personal representative will continue liable in respect of his assets. At common law a husband was liable for his wife's ante-nuptial debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or not. But he could not be sued alone for such debts if his wife was alive, and he could not be sued at all for them after his wife's death (*o*). As to persons married on or after the 1st January, 1883, s. 14 of the Married Women's Property Act, 1882, provides that a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Act relating to joint stock companies, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid ; but he shall not be liable for the same any further or otherwise.

The husband's liability cannot be regarded as a joint liability only. The cases therefore of *King* v. *Hoare* and *Kendall* v. *Hamilton* (*p*) have no application to actions against husbands for their wives' ante-nuptial debts. The cause of action, however, is the wife's contract, and the Statute of Limitations has always been regarded as beginning to run in the husband's favour, as well as the wife's, from the time when the cause of action accrued against her ; and any

(*o*) Per Lindley, L.J., in Beck *v.* Pierce, (1889) 23 Q. B. D. 316, 320.

(*p*) See *ante*, pp. 413, 415.

acknowledgment or part payment by her before marriage kept her debt alive, both as against her and her after taken husband ; but similar acts by her after marriage were of no avail, either against herself or as against her husband. Although the Married Women's Property Act, 1882, enables a wife to keep alive her liabilities in respect of her separate estate by making an acknowledgment, or by part payment, or by suffering judgment to be obtained against her, such acts, it would seem, do not affect her husband. On the other hand, similar acts by him will not affect her direct liability to her creditors (*q*).

Liability of personal representative of deceased husband for credit given to wife during cohabitation.

The liability of the husband on the wife's contracts for necessaries for the household is governed by the general principles of the law of principal and agent. He must have expressly or impliedly authorised her to act as his agent. Where she is living with her husband, and goods ordered or supplied are of such a character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls, the presumption *primâ facie* arises of an actual authority, but that presumption may be rebutted by proof of an arrangement under which a substantial allowance has been made by the husband to the wife for household expenses on the understanding that she was not to pledge his credit (*r*).

It is immaterial whether the persons dealing with the wife did or did not know that she was a married woman (*s*). But if the plaintiff gets judgment against the married woman alone, he cannot afterwards get judgment against her husband also. His remedy is alternative, and it cannot be made available against the two (*t*).

The authority of the wife is revoked by the death of her husband, and therefore his estate can only be made liable for credit given to his wife during his life.

(*q*) Beck *v.* Pierce, (1889) 23 Q. B. D. 316.

(*r*) Morel Brothers & Co. *v.* Earl of Westmoreland, [1903] 1 K. B. 64; [1904] A. C. 11; Paquin, Ltd. *v.* Beauclerk, [1906] A. C. 148.

(*s*) *Ibid.*

(*t*) Morel Brothers *v.* Earl of Westmoreland, *ubi sup.*

The same principles apply where a man cohabits with a woman who passes as his wife (*u*).

Evidence in support of claims.

With regard to the evidence in support of claims against the estate of a deceased person, there is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration. If the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon (*x*).

Ne unques executor.

Where the executor or administrator denies the character in which he is sued he must do so specifically (*y*). This was formerly done by pleading *ne unques* executor or administrator (*z*).

Joinder of claims against representative in that capacity with personal claims.

Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*a*).

(2) *On Obligations Ex Delicto.*

At common law.

The rule of the common law was and remains, except so far as altered by the Act 3 & 4 Will. IV. c. 42, that an action for a wrong committed, for which unliquidated damages only could be recovered, cannot be brought against the legal personal representatives of the wrongdoer (*b*). Such a right of action is not capable of assignment (*c*).

Effect of 3 & 4 Will. IV. c. 42, s. 2.

The stat. 3 & 4 Will. IV. c. 42, s. 2, enables an action to be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property, real or personal,

(*u*) Blades *v.* Free, (1829) 9 B. & C. 167.

(*x*) *Re* Hodgson, (1885) 31 C. D. 177; *Re* Farman, (1888) 57 L. J. Ch. 637; Rawlinson *v.* Scholes, (1898) 79 L. T. 350.

(*y*) See Ord. 19, r. 13.

(*z*) See Williams (10th ed.) 1572.

(*a*) Ord. 18, r. 5.

(*b*) Kirk *v.* Todd, (1882) 21 C. D. 484; and for instances of mere tort, see Williams (10th ed.) 1352 *et seq.*

(*c*) Defries *v.* Milne, [1913] 1 Ch. 98.

so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debt of such person.

Apart from statute action maintained where in substance to recover property, or its proceeds, or value.

But there may be circumstances under which an action may be maintained for a tortious act against the executors or administrators of the wrongdoer apart from the above statute. The law as to this is stated as follows by Bowen, L.J., in *Phillips* v. *Homfray* (*d*), in delivering the judgment of the majority of the Court of Appeal :—

" The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the

Mere indirect benefit to wrongdoer insufficient to give right of action.

(*d*) (1883) 24 C. D. 439, 454.

executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. Two illustrations can be given of the above distinction with regard to the liability of executors. The produce, proceeds, or value, of waste, equitable or legal, committed by a tenant for life, can be followed into the hands of his executors and retaken from them. If he has wrongly cut timber, the timber or its proceeds or value can be followed. But no action for waste—permissive or voluntary (*e*)—as such, lies against the executors of a tenant for life. By non-repairing a house, or by plowing up ancient meadow, the tenant for life may have indirectly benefited himself or saved his own pocket. But neither law nor equity recognises in this indirect benefit which he may have received any ground for proceedings against his executors. A second illustration may be given of the distinction we have referred to. The rents, or the produce or profits of land, which have wrongly been received by a person other than the rightful owner (as a rule, and subject to certain exceptions that we need not now discuss) may be pursued by the rightful owner, and recovered from the wrongdoer, or, if he is dead, from his estate. But there is a sense in which the term 'profits' is used, with reference to land, to represent the unliquidated damages recoverable in respect of a trespass, as when an action for mesne profits is maintained, to recover, not the rents or produce of land, or their natural equivalent, but compensation for the bare possession wrongfully taken and held of the land itself. An action for mesne profits in this narrower sense will not lie at common law and apart from statute against executors, and no account would be decreed in equity,

(*e*) Query, whether an action for voluntary waste would not lie at the suit of the owner in fee of the immediate reversion against the personal representatives of the deceased tenant for life under the statute Marbridge (52 Hen. III.), and of Gloucester (6 Edw. I. c. 5), for waste committed by the deceased tenant for life, so as the injury and the action is brought within 3 & 4 Will. IV. c. 42, s. 2. See Woodhouse *v.* Walker, (1880) 5 Q. B. D. 404, 407, but the point was left open in *Re* Williames, (1885) 52 L. T. 41, and C. A. 54 L. T. 105, 106.

except in a case where the profits were either property or the produce, or profits, or value of property actually received."

In *Phillips* v. *Homfray* (*f*) by decree it had been declared that H. and F. and the estate of their deceased partner were liable to the plaintiffs for minerals taken by them under the plaintiffs' farm, and that H. and F. were liable to compensate the plaintiffs for user of all roads and passages under the farm, and inquiries were directed :—(1) As to the quantity of minerals taken and their value. (2) What quantities of minerals had been carried by the defendants through the roads or passages under the farm. (3) What upon the result of the second inquiry ought to be paid by the defendants as wayleave for the user of the roads and passages. (4) Whether the farm and the mineral property of the plaintiffs under it had sustained any and what damage by means of the way in which the defendants had worked under the farm. Pending these inquiries F. died, and his executrix moved to stay proceedings under the second, third, and fourth inquiries. And it was held in accordance with the principles so laid down by Bowen, L.J., that the proceedings under the second, third, and fourth inquiries must be stayed.

Action for deceit will not lie against personal representatives of wrongdoer.

On the same principle the case of *Re Duncan* (*g*) was decided. There the purchaser from a testator of certain worthless shares in a limited liability company, instead of repudiating and claiming rescission of the contract and return of purchase money on the ground of misrepresentation, claimed to be entitled to prove in an administration action for damages for misrepresentation against the testator's estate, and assessed his damages at the price he had paid the testator for the shares, and it was held that the damages were unliquidated and uncertain, and that the executors of the wrongdoer could not be sued merely because his estate might have benefited by the wrong complained of.

So an action for damages for misrepresentation contained in a prospectus is an action for deceit, and cannot be

(*f*) (1883) 24 C. D. 439. (*g*) [1899] 1 Ch. 387.

maintained against the personal representatives of a deceased director (*h*).

Nor action for mere negligence against personal representative of deceased director of a company.

Again an action cannot be maintained against the legal personal representatives of a deceased director for negligence as regards any loss beyond money placed in the director's hands (*i*), and they are not persons who can be made liable under s. 215 of the Companies (Consolidation) Act, 1908 (substituted for s. 165 of the Act of 1862), in the winding up of a company (*k*).

Effect of Directors Liability Act, 1890.

It would seem that under the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), there is a statutory liability to which the maxim "*Actio personalis moritur cum personâ*" does not apply (*l*).

Inquiry decreed as to damages will abate by death of defendant.

In cases where the maxim applies, even after decree if the defendant dies pending the inquiry as to damages, the proceedings cannot be continued against his personal representatives (*m*).

Liability of personal representative of deceased husband for tortious act of wife.

With regard to liability for tort arising out of the relation of husband and wife, since the Married Women's Property Act, 1882, the husband's liability for wrongs committed by his wife before marriage is restricted, as in the case of antenuptial debts of his wife, to the extent of property which he shall have acquired or become entitled to from or through his wife, but his joint common law liability still remains for any fraud or other torts committed by her during the coverture, unless it is directly connected with the wife's own contract and is the means of effecting or inducing it and is part of the same tranaction. The Act of 1882 does not relieve him from liability for wrongs done by his wife during the coverture (*n*).

(*h*) Peek *v.* Gurney, (1873) L. R. 6 H. L. 377.

(*i*) Overend, Gurney & Co. *v.* Gurney, (1869) L. R. 4 Ch. 701; affirmed L. R. 5 H. L. 480.

(*k*) *Re* British Guardian Life Assurance Co., (1880) 14 C. D. 335.

(*l*) Shepheard *v.* Bray, [1906] 2 Ch. 235; but on appeal, [1907] 2 Ch. 571, a settlement was arrived at, and the Court intimated they were not prepared to assent to all that was decided by the Court below.

(*m*) Smith *v.* Eyles, (1742) 2 Atk. 385; Phillips *v.* Homfray, *ubi sup.*; Daveren *v.* Wootton, [1900] 1 I. R. 273.

(*n*) Seroka *v.* Kattenburg, (1886) 17 Q. B. D. 177; Earle *v.* Kingscote, [1900] 2 Ch. 585; but see observations of Fletcher-Moulton, L.J., in Cuenod *v.* Leslie, [1909] 1 K. B. 880, 888.

The Act gives the option of suing the wife where she has separate property, but the husband is not discharged from his old common law liability, and the plaintiff may, therefore, sue the husband and wife jointly or the wife alone for damages. If the old common law action against the husband and wife jointly is adopted by the plaintiff it must be a joint judgment (*o*), and the execution follows the judgment (*p*). It would seem, therefore, that on the death of the wife after judgment, the husband surviving, it could be enforced against him (*q*), and it would follow against his personal representative. But if the wife should die before judgment the action abates (*r*).

Distinction where tortious act is a breach of a *quasi* contract:

The maxim "*Actio personalis moritur cum personâ*" does not apply where the act is not a mere tort, but is a breach of a *quasi* contract, as where the claim is founded on a breach of a fiduciary relation or a failure to perform a duty. In such cases the law implies a contract that a man will faithfully perform the duties which he has undertaken (*s*). Consequently the representatives of a deceased trustee have always been held liable for loss occasioned by the breach of trust of the deceased trustee in his lifetime, whether he derived benefit from the breach of trust or not (*t*), and although the consequences do not occur until after his death (*u*), and there is no difference between a loss occasioned by default and a loss occasioned by act (*x*).

e.g., breach of trust;

negligence of deceased solicitor.

On this principle an action can be maintained against the legal personal representatives of a deceased solicitor for want of exercise of reasonable care and skill in the performance of his duties as solicitor for the plaintiff (*y*).

Restriction on rule of no contribution between tort-feasors.

The rule that wrongdoers cannot have redress or con-

(*o*) Beaumont *v.* Kaye, [1904] 1 K. B. 292; and see Cuenod *v.* Leslie, [1909] 1 K. B. 880.

(*p*) Scott *v.* Morley, (1887) 20 Q. B. D. 120, 124.

(*q*) Com. Dig. Baron and Feme, Y. 2 B.; and see per Lindley, L.J., in Beck *v.* Pierce, (1889) 23 Q. B. D. 316, 320.

(*r*) Capel *v.* Powell, (1864) 34 L. J. C. P. 168.

(*s*) Concha *v.* Murrieta, (1889) 40 C. D. 543, 553, per Cotton, L.J.

(*t*) Williams (10th ed.) 1365.

(*u*) Devaynes *v.* Robinson, (1857) 24 B. 86, 95; Grayburn *v.* Clarkson, (1868) L. R. 3 Ch. 605.

(*x*) *Ibid.*

(*y*) Blyth *v.* Fladgate, [1891] 1 Ch. 337.

tribution against each other, established by the case of *Merryweather* v. *Nixon* (*z*), would seem to be confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act (*a*).

In cases of breach of trust.

As between two trustees who are in *pari delicto*, the one who has made good a loss occasioned by a breach of trust for which the two are jointly and severally liable may obtain contribution to that loss from the other, unless the trustee claiming contribution is also a *cestuis que trust* and has received as between himself and his co-trustee an exclusive benefit by the breach of trust (*b*), or unless there are other special circumstances, as where the acting trustee is the solicitor for the trust (*c*), or there has been such fraud that the Court would hold itself entirely aloof (*d*). But a passive trustee is not entitled to indemnity, as distinguished from contribution, from the acting trustee where a breach of trust has been committed unless there are special circumstances, as where a trustee has himself got the benefit of the breach of trust, or there has existed a relation which will justify the Court in treating him as solely liable for the breach of trust ; for there is no rule that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee (*e*). The principles applicable between co-sureties seeking contribution apply equally between co-trustees, and it has been held that such right of contribution gives rise to a debt, in some cases in the nature of a specialty, in others of a simple contract (*f*). It follows that a right to contribution is enforceable against the estate of a deceased trustee (*g*).

(*z*) (1799) 8 T. R. 186.

(*a*) Adamson *v.* Jarvis, (1827) 4 Bing. 66, 73 ; Palmer *v.* Wick and Pulteneytown Steam Shipping Co., [1894] A. C. 318, 324, 333.

(*b*) Chillingworth *v.* Chambers, [1896] 1 Ch. 685, 707.

(*c*) Bahin *v.* Hughes, (1886) 31 C. D. 390.

(*d*) See Lewin on Trusts (14th ed.) pp. 1150 *et seq.*

(*e*) Bahin *v.* Hughes, *ubi sup.*

(*f*) Robinson *v.* Harkin, [1896] 2 Ch. 415, 426, per Stirling, J.

(*g*) Priestman *v.* Tindall, (1857) 24 Beav. 244 ; and see *Re* Harrison, [1891] 2 Ch. 249, 253 ; *Re* Jordan, [1904] 1 Ch. 260, 263.

Rule excluded by Directors Liability Act, 1890.

The ordinary rule that there shall be no contribution between tortfeasors is excluded by s. 5 from the particular class of tort coming within the Directors Liability Act, 1890 (*h*).

Liability of personal representative of deceased tenant for life of leaseholds or waste:

where there is no express obligation in the Will;

Although no action for waste, permissive or voluntary, as such, lies against the personal representatives of a tenant for life (*i*), yet a tenant for life, whether legal or equitable, is within the maxim *Qui sentit commodum sentire debet et onus*, and he cannot take the benefit without taking also the onus of the gift (*k*). Therefore as to leasehold property the tenant for life, and every successive owner of the lease, is bound, as between himself and the testator's estate, to perform the covenants and indemnify the estate (*l*). But where successive interests in leasehold property are given by Will without the intervention of trustees (*m*), the legal tenant in remainder has no claim on coming into possession against the personal representatives of the deceased tenant for life in respect of dilapidations of the property suffered during his life, although if there had been a claim by the lessor against the testator's estate the executors of the testator could have recovered against the estate of the tenant for life for waste during the life interest, but not against the tenant in remainder (*n*). It would seem that the reason is that the only liability or obligation of the tenant for life is as assignee to indemnify the testator's estate against breach of covenant in the lease while enjoying the benefit given to him under the Will, and on his death the remainderman need not accept what is left if he objects to the liability (*o*).

where there is an express obligation in the Will.

Where, however, an express obligation arises under the Will, as if a person has an estate given to him with an obligation imposed upon him of keeping that estate in repair, if the

(*h*) Gerson *v.* Simpson, [1903] 2 K. B. 197.

(*i*) Phillips *v.* Homfray, (1883) 24 C. D. 439, per Bowen, L.J., at p. 455; and see *Re* Cartwright, (1889) 41 C. D. 532, as to permissive waste.

(*k*) See *ante*, p. 408, and *post*, p. 475.

(*l*) Kingham *v.* Kingham, [1897] 1 I. R. 170; *Re* Betty, [1899] 1 Ch. 821; *Re* Gjers, [1899] 2 Ch. 54.

(*m*) Cf. *Re* Fowler, (1881) 16 C. D. 723, as to the duty of trustees.

(*n*) Parry *v.* Hopkin, [1900] 1 Ch. 160.

(*o*) Cf. *Re* Courtier, (1886) 34 C. D. 136.

obligation is not performed there is, in equity, a claim upon the party so failing during his life, or against his estate after his decease ; and where the legal estate is vested in trustees, the trustees, as representing the inheritance and for the benefit of all the successive equitable owners, are the proper persons to raise the question and to bring in the claim in the course of the administration of the estate of the tenant for life (*p*), but there would seem to be no reason why this equitable claim should not be enforced at the instance of a succeeding beneficiary (*q*).

Liability of personal representative of copyhold tenant where there is custom to repair.

So a tenant at will of copyhold tenements who accepts his tenancy upon the terms of the custom of the manor that he shall keep the premises in repair impliedly contracts to discharge the customary obligation to repair, and for breach of this implied contract the lord has a right of action against the personal representatives of the deceased tenant (*r*).

Liability of personal representative of deceased incumbent for dilapidations.

Again, the liability of the personal representative of a deceased incumbent for dilapidations is not considered as arising from a tort in the testator, but as a duty or obligation which he ought to have performed, and in respect of which his estate is liable (*s*).

Sect. 2.—*Liability for his own Acts.*

(1) *On Obligations Ex Contractu.*

Personal liability on his own contracts.

It would seem on the authorities that the only cases in which an executor or administrator may be sued as executor or administrator on a promise made by him as executor or administrator, so as to charge him no further than in his representative capacity, are where the consideration for the promise of the executor or administrator was a contract or transaction with the testator or intestate (*t*) ; and the cases show that no contract can be made with an executor or

(*p*) *Re* Williames, (1885) 52 L. T. 41, and (C. A.) 54 L. T. 105.

(*q*) *Ibid.* ; and see Batthyany *v.* Walford, (1886) 33 C. D. 624 ; 36 C. D. 269.

(*r*) Blackmore *v.* White, [1899] 1 Q. B. 293.

(*s*) See *ante*, p. 408 ; and Williams (10th ed.) 1362 *et seq.*

(*t*) See *post*, p. 433.

administrator which will not charge him personally, but the assets of the testator. For although an executor or administrator has power to give a lien or charge on specific assets, a person cannot by contract with an executor or administrator acquire a right to prove as a creditor against the estate (*u*).

Where the executor or administrator is sued on his own contract, it is immaterial, so far as regards his liability, whether he contracted in his representative capacity or not, or whether the testator or intestate left assets or not (*x*).

Liability in carrying on business of deceased.

An executor or administrator who carries on the business of his testator or intestate makes himself personally liable, *de bonis propriis*, for all the debts contracted by him in so acting, whether he is entitled or not entitled to be wholly, or to any extent indemnified out of the estate, and whether it is sufficient or insufficient for the purpose, and it makes no difference that he acted avowedly in the character of executor or administrator (*y*).

Creditor entitled to be substituted to debtor's right to indemnity.

Although a creditor of the executor or administrator has no direct claim against the estate of the testator or intestate, yet he has a right to be substituted to the right of the executor or administrator to indemnity (*z*).

When right to indemnity exists.

Executors or administrators are entitled to carry on a business of the testator or intestate for such reasonable time as is necessary to enable them to sell his business property as a going concern, and in such case are entitled, even as against the testator's or intestate's creditors, to an indemnity in respect of the liabilities properly incurred in so doing (*a*).

Effect of carrying on business under authority in Will.

Where a business has been carried on under an authority conferred upon the executors by the Will, they are entitled to

(*u*) See per Mellish, L.J., in Farhall *v.* Farhall, (1871) L. R. 7 Ch. 123.

(*x*) Williams (10th ed.) 1416, 1423.

(*y*) Labouchere *v.* Tupper, (1857) 11 Moo. P. C. 198, 221; and see *ante*, p. 223.

(*z*) *Re* Evans, (1887) 34 C. D. 597.

(*a*) Dowse *v.* Gorton, [1891] A. C. 190, 199, per Lord Herschell. This principle applies with greater force against the creditors of the testator where the business is carried on by a receiver and manager for the creditors appointed by the Court in administration proceedings. *Re* Brooke, [1894] 2 Ch. 600. That a receiver appointed by the Court can only look to assets under the control of the Court for indemnity, and cannot claim indemnity by beneficiaries personally, see Boehm *v.* Goodall, [1911] 1 Ch. 155.

a general indemnity out of the estate as against all persons claiming under the Will, but they cannot by reason only of such authority maintain this right against the creditors of the testator (*b*). The propriety of the executor's or administrator's conduct in carrying on the business, as between himself and those beneficially interested in the estate, does not give the creditors of the trade, becoming so after the death, the rights of creditors of the testator or intestate (*c*).

Limit to the right to indemnity.

If the business is carried on in accordance with the provisions of the Will the indemnity of the executors is only limited by the amount of the assets which the testator has authorised the executors to employ in the business, and it is not limited to that portion of the assets which may have come into existence or changed its form since the testator's death (*d*).

Effect of carrying on business without any authority.

Where there is no provision in the Will to continue the business, and the executor continues it, not for the purpose of winding it up and selling it as a going concern in the interests of the creditors, but on his own behalf, he is not entitled to any indemnity, and the assets will be divided among the creditors of the testator in priority to the claims of creditors in respect of goods supplied to the executor for the purpose of carrying on the business after the testator's death (*e*).

Effect of creditors of testator assenting to business being carried on.

But if the creditors of the testator must be taken to have known of and assented to the business being carried on, and for a length of time which would preclude it being suggested that it was carried on only for the purpose of selling it as a going concern, they lose their right to prior payment out of the testator's assets, and the executors will be entitled to indemnity (*f*).

Further, if the business is carried on by the executors at the instance of the old creditors, without regard to the terms of the Will, the executors, it would seem, would have the

(*b*) Dowse *v.* Gorton, [1891] A. C. 190, 199.

(*c*) Labouchere *v.* Tupper, *ubi sup.*

(*d*) Dowse *v.* Gorton, per Ld. Macnaghten, at p. 208.

(*e*) *Re* Millard, (1895) 72 L. T. 823

(*f*) Hodges *v.* Hodges, [1899] 1 Ir. R. 480.

ordinary rights of agents against their principals, and would be entitled to look to the old creditors for indemnity for what they had done in this behalf (*g*).

Effect of executor being in default on his right to indemnity.

Although where the executor carries on the business of his testator under a direction contained in the Will, his creditors are entitled to stand in his place and to claim the benefit of his right to resort for indemnity to the assets authorised to be employed in carrying on the business, yet in such case, if the executor is in default, not being himself entitled to an indemnity except upon terms of making good his default, his creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good (*h*).

Default of one executor will not prejudice.

But the indemnity to the executors is not to the executors as a body, but to each of them who has acted properly, and therefore, excluding the case of an executor who may be responsible for the acts of his co-executor, an executor who has a clear account is entitled to an indemnity for what he has properly done independently of the question whether another executor has been found a defaulter or has committed a breach of trust, and consequently a creditor entitled to sue the executor is entitled to the benefit of his indemnity (*i*).

Creditors entitled by subrogation may enforce their rights directly.

In the administration of an estate, where the testator's or intestate's business has been carried on after his death by the executors or administrators under such circumstances as to entitle them to indemnity, the creditors of the business, entitled by subrogation to the equities of the executors or administrators, or of any one of them, can enforce their rights in pending administration proceedings by applying for an inquiry what debts and liabilities have been properly incurred in carrying on the business since the death and remain due to the applicants and other creditors of the executors or administrators and for payment (*k*), or if there is no other proceed-

(*g*) Hodges *v.* Hodges, [1899] 1 Ir. R. 480; and see *Re* Millard, (1895) 72 L. T. 823, 827.

(*h*) *Re* Johnson, (1880) 15 C. D. 548; and see *Re* British Power Traction and Lighting Co., Ltd., [1910] 2 Ch. 470.

(*i*) *Re* Frith, [1902] 1 Ch. 342.

(*k*) *Ibid.*

ing pending an order for administration may be made at the suit of such a creditor as plaintiff (*l*).

Effect of s. 4 of Statute of Frauds with regard to special promise to answer damages.

The 4th section of the Statute of Frauds (29 Car. II. c. 3) enacts that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

Entire agreement must be in writing.

Promise must be by executor or duly constituted administrator.

The entire agreement, including the consideration for the promise as well as the promise itself, must be in writing (*m*). Moreover, the person making the promise must be either the executor whose title is derived from the Will, or the administrator after grant. A promise by a person, not being an executor, before the grant to him of administration, is not within the statute, and is therefore valid if for sufficient consideration, although not in writing (*n*).

Promise requires consideration to support it.

The words of the statute are merely negative, and the agreement is still liable to be tried as all other agreements merely in writing are by the common law, unless under seal there must still be a sufficient consideration to support the agreement in an action upon it to charge the executor or administrator *de bonis propriis*. If a person indebted in one right in consideration of forbearance for a particular time promise to pay in another right, this convenience will be a sufficient consideration to warrant an action against him or her in the latter right, but where the declaration stated that the defendant being indebted as administratrix promised to pay when requested, it was held there was no sufficient consideration to support the demand against her in her

(*l*) *Re* Shorey, (1898) 79 L. T. 349.

(*m*) Saunders *v.* Wakefield, (1821) 4 B. & Ald. 595. Sect. 3 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), would seem to apply to contracts of suretyship or guaranty only (see Pollock on Contracts (7th ed.) p. 158), and would therefore not affect this decision so far as regards any special promise by an executor or administrator.

(*n*) Tomlinson *v.* Gill, (1756) Amb. 330.

personal capacity, for she derived no advantage or convenience from the promise made (*o*).

When instrument itself imports consideration.

Although a promise to pay that which the person promising is under no legal or moral obligation to pay may be considered *nudum pactum*, yet this does not apply to an instrument importing a consideration and which may induce forbearance. Consequently in *Ridout* v. *Bristow* (*p*), where a widow administratrix gave a promissory note "for value received by my late husband," it was held that the act of giving such a security supersedes the necessity of an investigation as to there being assets, and that it was not competent for the defendant to show that there were no assets. So in *Childs* v. *Monins* (*q*) a promise to pay on demand was held to be tantamount to an admission of assets to satisfy the demand when made, and an engagement to pay interest until demand an inducement to suspend demand. But it would seem the effect of the note or bill may be controlled by a written contemporaneous agreement forming together one contract (*r*), so that if it appear that the arrangement was that the note or bill given by the executor or administrator was merely to give the creditor the same advantage as a judgment of assets *quando acciderint*, in that case it is no admission of assets on which the executor or administrator would be held personally liable (*s*).

Distinction between advancing money to pay creditors and giving promissory notes to creditors.

Although an executor or administrator who advances money of his own for the purpose of paying creditors of the estate is entitled to be recouped in full in priority to other creditors (*t*), yet an executor or administrator, who makes himself liable for debts of the deceased, as by giving promissory notes to creditors of the deceased in the course of carrying on the deceased's business after his death, has no priority in respect of such debts over the other creditors of

(*o*) Rann *v.* Hughes, in note to Mitchinson *v.* Hewson, (1797) 7 T. R. 348, 350.

(*p*) (1830) 1 Cr. & J. 231; 35 R. R. 710.

(*q*) (1821) 2 Brod. & B. 460.

(*r*) Maillard *v.* Page, (1870) L. R. 5 Ex. 312, 319.

(*s*) Bowerbank *v.* Monteiro, (1813) 4 Taunt. 844.

(*t*) Spackman *v.* Holbrook, (1860) 2 Giff. 198.

the deceased, but stands in the same position as the creditors for whose debts he has made himself liable (*u*).

Where any person is under obligation to indorse a bill of exchange in a representative capacity, he may, under s. 31 (5) of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), indorse the bill in such terms as to negative personal liability.

Personal liability under the Bills of Exchange Act, 1882, may be negatived.

Executors and administrators have power under s. 21 (2) of the Trustee Act, 1893 (56 & 57 Vict. c. 53), to submit to arbitration any debt, account, claim or thing whatever relating to the testator's or intestate's estate without being responsible for any loss occasioned thereby.

Effect of submission to arbitration.

A submission is in general considered as a reference not only of the cause of action, but also of the question whether or not the executor or administrator has assets (*x*). Therefore, if there are no assets to answer the award if made against him, the executor or administrator ought not to put the other party to the expense of arbitration without protest; as in that case, if the submission is in general terms, it may amount to an admission of assets (*y*). But on a general reference an arbitrator is not justified in rejecting evidence to show that there are no assets. The form of the award will determine whether the executor or administrator is personally liable to pay or whether the payment is only out of assets (*z*); and if the arbitrator awards the executor or administrator to pay a certain sum, it is equivalent to determining that assets exist (*a*).

(2) *On Obligations Ex Delicto.*

The subject of the liability of an executor or administrator for a devastavit is considered in a later part of this work (*b*). It is intended here to deal with his liability to third parties in his individual character, and his right to

(*u*) Lucas *v.* Williams, (1862) 10 W. R. 677.

(*x*) *Re* Wansborough, (1815) 2 Chitt. Rep. 41.

(*y*) Riddell *v.* Sutton, (1828) 5 Bing. 200.

(*z*) See Russell on Arbitration and Award (9th ed.), pp. 36, 252, and also Williams (10th ed.) 1424.

(*a*) *Re* Wansborough, *ubi sup.*

(*b*) See Chap. XLV.

indemnity in respect thereof out of the assets. In this relation there is no distinction between an executor or administrator and an ordinary trustee.

Personal liability for his own tort.

As no contract can be made with an executor or administrator which will not charge him personally (*c*), *à fortiori* a tort committed by him must charge him personally ; and it is immaterial, so far as regards his liability, whether he has assets of his testator or intestate or not.

When entitled to indemnity out of the estate.

The standard of duty which regulates the liability for tort arising from negligence between individuals is not the same as that which is applied between trustee and *cestui que trust*. Apart from any relation of trustee and *cestui que trust*, negligence is defined to be " the breach of that duty which in certain cases the law imposes to exercise such skill or care as is reasonable under the circumstances of each particular case " (*d*). On the other hand, as a general rule, a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own (*e*).

If a trustee in the management of the trust estate commits a tort—for instance, if in carrying on a colliery business he lets down the surface of the land and injures buildings of an adjoining owner—damages may be recovered against him personally by the person injured ; but if the injury has been occasioned by the trustee in the reasonable management of the estate he is entitled to be indemnified out of the assets (*f*).

So also where a trustee properly employs an agent to do some act who makes a mistake, although the consequences of such act subjects the trustee to legal liability to a third party, as, for instance, where he employs an agent to fell trees and injury is caused to a passer-by, yet the liability as between the trustee and the estate must be borne by the estate (*g*).

Whenever a trustee in the ordinary and reasonable

(*c*) See *ante*, p. 429.
(*d*) Addison on Torts (8th ed.) 701.
(*e*) Speight *v.* Gaunt, (1883) 9 A. C. 1, 19 ; but see *post*, p. 657.
(*f*) *Re* Raybould, [1900] 1 Ch. 199.
(*g*) Benett *v.* Wyndham, (1862) 4 De G. F. & J. 259.

management of the trust estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably, is entitled to be indemnified out of the estate (*h*).

Person recovering damages may avail himself of the right to indemnity.

Moreover, it has been held on the principle of *Dowse* v. *Gorton* (*i*), where damages have been recovered against a trustee in respect of a tort, the person so recovering can avail himself of the trustee's right to indemnity so as to obtain payment of the damages and costs so recovered direct out of the trust estate (*k*).

(*h*) *Re* Raybould, [1900] 1 Ch. 199.
(*i*) [1891] A. C. 190; *ante*, p. 430.
(*k*) *Re* Raybould, *ubi sup.*

CHAPTER XXX.

OF SET-OFF.

SET-OFF in an action is a right given by statute (*a*) to a man who is sued for a sum of money to defend himself by claiming a debt due to himself from the plaintiff in satisfaction or reduction of the debt for which he is sued (*b*). There was no set-off at common law, each party had to bring a separate action, and there can be no set-off except in cases in which the statute gives a right of set-off (*c*). A statutory right.

The stat. 2 Geo. II. c. 22, s. 13 (confirmed and made perpetual by 8 Geo. II. c. 24, s. 4), provides that "if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party one debt may be set against the other." Mutual debts may be set off.

Set-off may, in general, be pleaded wherever the claims on both sides are liquidated debts which can be ascertained with certainty at the time of pleading. But in order to give the right the debts must be between the same parties and in the same right (*d*). For instance, a defendant cannot set off a personal debt against a debt due to the plaintiff as executor (*e*), nor a debt due to him as executor against a debt due to the plaintiff personally (*f*). But a defendant can set off a debt originally due from the plaintiff to a third person who has assigned it to the defendant (*g*), unless the assign- Both claims must be liquidated debts. Between the same parties and in the same right.

(*a*) 2 Geo. II. c. 22, and 8 Geo. II. c. 24.

(*b*) See per Ld. Davey in Williams *v.* North's Navigation Collieries (1889), Ltd., [1906] A. C. 136, 141.

(*c*) Per North, J., in *Re* Gregson, (1887) 36 C. D. 223.

(*d*) See Bullen & Leake on Pleading (6th ed.) (1905), 772 *et seq.*

(*e*) Hutchinson *v.* Sturges, (1741) Willes, 261.

(*f*) Bishop *v.* Church, (1748) 3 Atk. 691; Gale *v.* Luttrell, (1826) 1 Y. & J. 180; *Re* Gregson, *ubi sup.*

(*g*) Bennett *v.* White, [1910] 2 K. B. 643.

ment was subsequent to a decree for administration and alters the rights of the parties (*h*).

Further, to an action by an administrator, who sues in his representative character, for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime (*i*). So also to an action by the administrator for a debt due to the intestate in his lifetime, the defendant cannot set off a debt which accrued due from the estate after the death of the intestate, as, for instance, on a promissory note made by the intestate which did not become due until after the intestate's death (*k*).

Again, defendants being sued as executors for a debt which accrued due from the testator in his lifetime cannot set off a debt which accrued due from the plaintiff to them as executors since the death of the testator (*l*). But an account stated by an executor as such must be taken to show a debt due from his testator to the other party, and against this a debt due from that other party to the testator may be set off (*m*).

The same principle applies to counter-claims (*n*).

There is no principle which requires a different rule as to set-off in equity (*o*).

Equitable set-off.

But although demands due in different rights cannot be set off—the principle being, that one man's money shall not be applied to pay another man's debt—yet where a plaintiff suing in his representative character is entitled also beneficially to the debt, as, for instance, by becoming entitled to a bond debt not only as administrator but as sole next-of-kin, all administration expenses being discharged, the defendant

(*h*) Middleton *v.* Pollock, (1875) L. R. 20 Eq. 29.

(*i*) Rees *v.* Watts, (1855) 11 Exch. 410.

(*k*) Newell *v.* The National Provincial Bank of England, (1876) 1 C. P. D. 496.

(*l*) Rees *v.* Watts, *ubi sup.*, at p. 416, per Coleridge, J.

(*m*) *Ibid.*

(*n*) Macdonald *v.* Carrington, (1878) 4 C. P. D. 28.

(*o*) Newell *v.* National Provincial Bank of England, *ubi sup.*, per Lindley, J.

is entitled in equity to set off sums due to him from the plaintiff personally for monies advanced (*p*).

So also where a banking firm stopped payment and the defendant at the time had an overdrawn account and also an account in credit "as executor," and there being in the circumstances no such equities as to prevent the defendant treating the balance to the executorship account as a fund to which he was beneficially as well as legally entitled, it was held he was entitled to set it off against the claim in an action on the overdrawn account by the trustee in the bankruptcy of the banking firm (*q*).

No equitable set-off where to establish equitable title account necessary.

In *Ex parte Morier* (*r*) there were two accounts, one the account of A., the other the account of A. and B., and it was said A. and B. were executors and A. was also the residuary legatee, and therefore entitled to the whole of the fund. But it appeared that the executors were jointly liable for some rates and taxes, and a solicitor's bill of costs which had not been paid, so that the fund had never been liquidated so as to become the trust fund of A.; consequently it was held there could not be an equitable set-off, since where money is due in *autre droit* the only exception which equity has introduced into the principle of a legal set-off is when the money is really and truly the property of the one man in the name of another, not when the result of taking the accounts would be to show that the ultimate balance would be his property.

Set-off of debt due to administrator in his own right from next-of-kin.

So a debt due to the administrator of an intestate in his own right from one of the next-of-kin may be set off in a suit by the next-of-kin for administration of the estate against a sum due from the administrator in respect of the next-of-kin's share of the intestate's estate (*s*), and it does not make any difference that the share of the next-of-kin has been paid into Court (*t*).

No set-off against assignee of

Neither at law nor in equity would a set-off be allowed

(*p*) Jones *v.* Mossop, (1844) 3 Hare, 568.

(*q*) Bailey *v.* Finch, (1871) L. R. 7 Q. B. 34.

(*r*) (1879) 12 C. D. 491.

(*s*) Taylor *v.* Taylor, (1875) L. R. 20 Eq. 155.

(*t*) *Re* Jones, [1897] 2 Ch. 190, 203.

equitable chose in action in respect of subsequent debt.

against the assignee of an equitable chose in action of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it (*u*). But every person who takes an assignment, whether by mortgage or otherwise, of a share in the hands of a legal personal representative, must take subject to the settlement of accounts as between the assignor and the legal personal representative; and it matters not whether those accounts are accounts in the administration of the estate, or accounts between the assignor and the legal personal representative (*x*).

Equitable set-off can only arise where there is some equitable defence, or where one debt is legal and the other equitable (*y*).

Judicature Acts only affect procedure.

The procedure as to set-off and counter-claim in an action is now regulated by Ord. 19, r. 3, of R. S. C., but the Judicature Acts did not alter the rights of parties, they only affected procedure (*z*).

(*u*) Watson *v.* Mid-Wales Railway Co., (1867) L. R. 2 C. P. 593; *Re* Milan Tramways Co., (1882) 22 C. D. 122.

(*x*) *Re* Jones, [1897] 2 Ch. 190.

(*y*) *Re* Milan Tramways Co., (1884) 25 C. D. 587, 593, per Fry, L.J.

(*z*) Stumore *v.* Campbell & Co., [1892] 1 Q. B. 314, 316.

CHAPTER XXXI.

OF STATUTES OF LIMITATIONS AS AFFECTING PARTICULARLY EXECUTORS AND ADMINISTRATORS.

The statute continues to run notwithstanding subsequent death.

WHERE there is a cause of action, and a person who can be sued, the Statute of Limitations begins to run, and having begun it continues to run, notwithstanding the death of the person to whom the right of action accrued (*a*).

No cause of action until there is a person in existence capable of suing.

A cause of action cannot be said to exist unless there be a person in existence capable of suing; so that if the statute has not begun to run during the life of an intestate, then it does not begin to run until letters of administration to his estate have been taken out (*b*). So if a creditor dies intestate on the day a debt becomes payable, and there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not begin to run until after administration granted (*c*).

Executor can sue before probate.

Where the right of action accrued after the death of a person who if he had been living could have sued, if he leaves an executor, who proves the Will, inasmuch as the executor could sue before probate the statute begins to run from the death of the testator, but if he omits to appoint executors, or all the executors die without acting, or all renounce, it would seem the rights are the same as if the testator had died intestate (*d*).

No cause of action until there is a person who can be sued.

Since no one has a complete cause of action until there is somebody that he can sue, it follows that the statute only runs from the time that an executor has either acted or

(*a*) Penny *v.* Brice, (1865) 18 C. B. (N. S.) 393; Boatwright *v.* Boatwright, (1873) L. R. 17 Eq. 71, 74.

(*b*) Murray *v.* The East India Co., (1821) 5 B. & Ald. 204; Burdick *v.* Garrick, (1870) L. R. 5 Ch. 233; but see *post*, p. 452.

(*c*) Atkinson *v.* Bradford Building Society, (1890) 25 Q. B. D. 377.

(*d*) See Darby & Bosanquet on the Statutes of Limitations (2nd ed.), p. 48.

Executor cannot be sued until he has proved or acted.

proved the Will (*e*). Further, acts done by an executor abroad will not constitute him an executor in this country so as to enable him to be sued in this country (*f*).

Effect of plaintiff dying pending action.

The old cases show that where an action was commenced and the plaintiff died during the pendency of the action, his representatives, if the cause of action was one that survived to them, might commence a new action within a reasonable time, notwithstanding in the meanwhile the period of limitation had expired ; and in the case of the death of a defendant, the plaintiff might commence a new action within a reasonable time after probate of the Will or grant of administration. The Common Law Procedure Act enacted that in such cases the action should not abate, and that provision has been repeated in Ord. 17, r. 1, of the R. S. C., and under rules 2 and 4 orders may be obtained to make the personal representative a party and to carry on the proceedings between the continuing parties and such new party or parties. This however was the mere giving of a new remedy, and does not prevent a person bringing a new action under circumstances in which he could before have brought such a new action, as in the case of the death of the defendant before service of the writ (*g*).

Effect of creditor suing on behalf of himself and all others.

Formerly, if a creditor sued on behalf of himself and all others, every creditor was said to have an inchoate interest in the suit to the extent of its being considered as a demand and to prevent his being shut out because the plaintiff did not obtain a decree within six years (*h*). But now, owing to the change of practice, a creditor has no such inchoate interest in a suit for administration, whether commenced by another creditor or by an executor, until decree ; consequently a judgment for administration will not now save a claim if it is not pronounced till after the expiration of six years from the time the debt was incurred (*i*).

(*e*) Douglas *v.* Forrest, (1828) 4 Bing. 686.

(*f*) Flood *v.* Patterson, (1861) 30 L. J. Ch. 486.

(*g*) Swindell *v.* Bulkeley, (1886) 18 Q. B. D. 250.

(*h*) Sterndale *v.* Hankinson, (1827) 1 Sim. 393.

(*i*) *Re* Greaves, (1881) 18 C. D. 551 ; and see *ante*, p. 392.

Statute 21 Jac. I. c. 16 as to simple contract debts.

The stat. 21 Jac. I. c. 16 provides that all actions (*inter alia*) for account and of debt on simple contract shall be commenced within six years after the cause of action.

Suits in equity are not within the words of this statute, it only applied to what were called common law actions, but being within the spirit and meaning of it, upon all legal demands, Courts of Equity were bound to yield obedience to its provisions, and as Courts of Equity will not entertain stale demands, they thought proper to adopt the limit of six years in analogy to the statute (*k*). But now that bills in equity have been abolished, the statute is binding upon the High Court in every case in which it applies (*l*).

Acknowledgment by part payment.

The stat. 21 Jac. I. c. 16 contained no provision as to acknowledgment or part payment of principal or payment of interest. But there has been grafted on this statute a series of judicial decisions as to the effect of acknowledgments and payments to take the case out of the statute. Under those decisions part payment of principal and payment of interest stand upon the same footing. Payment of interest is regarded as an acknowledgment of the debt, and from the acknowledgment a promise to pay the debt may and ought to be implied. Moreover, the acknowledgment was held to be sufficient evidence of a new and continuing contract (*m*).

By writing under Lord Tenterden's Act.

Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1) provides that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient to take any case out of the operation of the stat. 21 Jac. I. c. 16, unless in writing signed by the party chargeable thereby ; and that where there should be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the Act so as to be chargeable by reason of the written acknowledgment or

Effect of acknowledgment by one of two executors or administrators.

(*k*) Williams (10th ed.) 1655; Sterndale *v.* Hankinson, *ubi sup.*, at p. 398. As to limit of time, see Gelmini *v.* Moriggia, [1913] 2 K. B. 549.

(*l*) *Re* Greaves, *ubi sup.*, at p. 554.

(*m*) See *Re* Hollingshead, (1888) 37 C. D. 651, 657, per Chitty, J.

promise signed by any other of them, provided that nothing therein contained should alter the effect of any payment of any principal or interest made by any person whatsoever; and in an action against joint contractors or executors or administrators, the plaintiff, though barred by the Act as to one or more of such joint contractors or executors or administrators, shall be entitled to recover against any other of the defendants by virtue of the new acknowledgment or promise.

A statement by an executor in an affidavit for probate is not a sufficient acknowledgment of a debt within the meaning of Lord Tenterden's Act (*n*). An admission by an executor in a suit to which the creditor was not a party was held to be sufficient (*o*).

Effect of payment of interest by one of two executors or administrators.

The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor or administrator, that is, out of the assets of the testator or intestate. The effect is to keep the debt alive as against the assets. This is in accordance with the general rule that one of several executors or administrators, though he cannot by his contract impose any personal liability on his colleagues, may dispose of the assets so as to bind them (*p*).

Personal liability not involved by acknowledgment.

An executor or administrator is not to be made liable for a devastavit by reason of his having parted with assets simply because his co-executor or co-administrator has given an acknowledgment or promise, or made a payment within the statute. Moreover, the executor or administrator who has given the acknowledgment or promise or made the payment, is not thereby involved in any personal liability (*q*).

Payment or acknowledgment must

A payment or acknowledgment must be made to the creditor or his agent, or to someone who was entitled to

(*n*) *Re* Beavan, [1912] 1 Ch. 196, treating as no longer law Smith *v.* Poole, (1841) 12 Sim. 17; and cf. Spollan *v.* Magan, (1851) 1 Ir. C. L. 691; Edwards *v.* Jones, (1855) 1 K. & J. 534; *Re* Emmett, (1906) W. N. 201.

(*o*) Moodie *v.* Bannister, (1859) 4 Dr. 432; but see Stamford, etc., Co. *v.* Smith, [1892] 1 Q. B. 765, 768.

(*p*) *Re* Hollingshead, (1888) 37 C. D. 651, 658; *Re* Macdonald, [1897] 2 Ch. 181.

(*q*) *Ibid.*

receive payment of the debt, and to whom a promise to pay the debt could be presumed. There may be an exception to this rule in the case of a payment to a person believed to fill, though not in fact filling, a representative capacity, as where payment was made to a person who subsequently took out administration and with the intention that it should enure for the benefit of the estate of the intestate. In such case the administration would have relation back, in order not to lose the benefit of the contract (*r*).

be made to creditor or his agent,

but payment to person to whom grant of administration is subsequently made may be sufficient.

By 3 & 4 Will. IV. c. 42, s. 3, actions of covenant or debt upon bond or other specialty must be commenced within twenty years after the cause of action, or (s. 5) within twenty years after any acknowledgment shall have been made either by writing signed by the party liable or his agent, or by part payment or part satisfaction on account of any principal or interest.

Statute 3 & 4 Will. IV. c. 42, s. 3, as to specialty debts.

The operation of this Act is not confined to the case of a sole obligor, it extends as well to the case of a bond with several obligors, as to the case where the liability has been transferred by death to a representative of a party originally liable. The words " the party liable or his agent " are to be read as if they were " the party or parties liable, by virtue of the bond, &c., or any of them or his, her, or their agent." Moreover an acknowledgment in writing by one of several obligors stands on the same footing as payment so as to take out of the operation of s. 3 of the Act an action founded on the liability of the surviving obligors (*s*).

The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14, in reference to the Acts of 21 Jac. I. c. 16 and 3 & 4 Will. IV. c. 42, s. 3, provides that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly or severally, or executors or administrators of any contractor, no such contractor or co-

Effect of Mercantile Law Amendment Act, 1856.

(*r*) Clark *v.* Hooper, (1834) 10 Bing. 480; Bodger *v.* Arch, (1854) 24 L. J. Ex. 19; and see Stamford, Spalding & Boston Banking Co. *v.* Smith, [1892] 1 Q. B. 765, 769.

(*s*) Read *v.* Price, [1909] 1 K. B. 577; 2 K. B. 724.

debtor, executor or administrator shall lose the benefit of the said enactments or any of them so as to be chargeable by reason only of any payment of any principal, interest or other money by any other of such contractors or co-debtors, executors or administrators.

The effect which payment by a party liable formerly had in keeping the debt alive against other parties has been done away with by the Mercantile Law Amendment Act, 1856, but the effect of an acknowledgment by writing signed by a party liable has been left untouched by the Legislature. A person, however, cannot be made jointly liable with others without his consent, consequently under a joint and several bond a man cannot make his executor liable jointly with another, and any acknowledgment in writing signed by the executor must be taken as made in respect of the several liability of the deceased obligor and not of the joint liability of the surviving obligor (*t*).

Statute 37 & 38 Vict. c. 57, as to money charged upon or payable out of land, or any legacy.

Sect. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which is substituted for s. 40 of 3 & 4 Will. IV. c. 27, provides that "No action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same (*u*) shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

(*t*) Read *v.* Price, [1909] 1 K. B. 577; 2 K. B. 724.

(*u*) See *post*, pp. 453, 454. An interest in proceeds of sale of land held on trust for sale is within this section: *Re* Fox, [1913] 2 Ch. 75.

(1) *As to money charged upon or payable out of Land.*

Effect of 37 & 38 Vict. c. 57, s. 8, where specialty is charged on land.

Sect. 8 of the Real Property Limitation Act, 1874, reduced the period for recovering money charged on land from the twenty years given by 3 & 4 Will. IV. c. 27, s. 40, to twelve years, but left the twenty years for recovering specialties given by 3 & 4 Will. IV. c. 42, s. 3, untouched, and it was decided by *Sutton* v. *Sutton* (*x*) and *Fearnside* v. *Flint* (*y*) that where the money was in fact secured by a charge on land, the personal remedy on the covenant or collateral bond was limited in like manner, with the result that the statute applicable to such cases is now the Act of 1874 and not the Act of 3 & 4 Will. IV. c. 42.

Covenant to pay rentcharge.

Sect. 1 of the Act of 1874 which cuts down the period within which a rentcharge can be enforced to twelve years qualifies in a similar manner the time within which a covenant to pay a rentcharge can be enforced, so that after twelve years from the last payment without acknowledgment the remedy on the personal covenant as well as the remedy against the land is gone (*z*).

As regards joint liability.

The Mercantile Law Amendment Act, 1856, s. 14 (*a*), is confined to certain specified Acts which do not include either the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), or the Real Property Limitation Act, 1874, consequently the debtor in such cases, as from the year 1874, has been deprived of the protection given him by the Act of 1856 (*b*).

In *Re Lacey* (*c*) the question arose whether payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator with a covenant for payment of principal and interest, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other part of the real estate which was not subject to the mortgage, and thus

(*x*) (1882) 22 C. D. 511.
(*y*) *Ibid.*, 579.
(*z*) Shaw *v.* Crompton, [1910] 2 K. B. 370.
(*a*) *Ante*, p. 447.
(*b*) *Re* Lacey, [1907] 1 Ch. 330, 349, per Farwell, L.J.; and see *ante*, p. 447.
(*c*) [1907] 1 Ch. 330; and see *ante*, p. 402.

entitle the mortgagee to an order for administration of the whole of the testator's real estate. It was held on the principles laid down in *Roddam* v. *Morley* (*d*) that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty—that payment having been made by a party interested by reason of his liability with others in keeping down the debt, his act of payment binds those others because they are relieved to the extent of such payment from the liability which is imposed on them all, and since the question arose under s. 8 of the Real Property Limitation Act, 1874, to which the Mercantile Law Amendment Act, 1856, has no application, the right of action was kept alive against the other specific devisees.

In *Re Chant* (*e*) the reasoning on which *Roddam* v. *Morley* was founded was applied to simple contract debts, but in *Re Lacey* (*f*) Farwell, L.J., intimated that he failed to see why the Mercantile Law Amendment Act, 1856, should not have applied, if it had been cited, which it was not.

Effect of an express trust.

Sect. 25 of 3 & 4 Will. IV. c. 27, and s. 10 of 37 & 38 Vict. c. 57, provide in favour of a purchaser for valuable consideration that time shall begin to run as from the date of the conveyance as against any person claiming under an express trust or claiming to recover any sum of money or legacy charged upon or payable out of any land or rent and secured by an express trust, but these sections did not protect the trustee against a claim on the part of the *cestui que trust*.

Sect. 25 (2) of the Judicature Act, 1873, expressly provides that "No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

In order to bring a case within s. 25 of 3 & 4 Will. IV.

(*d*) (1857) 1 De G. & J. 1.
(*e*) [1905] 2 Ch. 225.
(*f*) [1907] 1 Ch. 330.

c. 27, and s. 10 of 37 & 38 Vict. c. 57, the land must be vested in a trustee upon an express trust and then the right of the *cestui que trust* to bring an action is saved. The trust must, however, arise upon the construction of the written instrument, not upon any inferences of law imposing a trust upon the conscience. A devise of land to A. paying a sum of money to B., or a devise to A. on condition of paying, is a charge and not a trust (*g*).

Trust for payment of testator's debts.

Where real estate is devised in trust for the payment of debts, in aid of the personal estate, the statute does not run in equity after the death of the testator (*h*). On the other hand, as a general principle it may be taken that a charge of debts upon personal estate, where it merely directs that to be done which must have been done if no direction had been given, is simply inoperative (*i*).

Before the Land Transfer Act, 1897, a trust or charge of real estate for payment of debts prevented those debts from being barred until the expiration of twelve years under s. 8 of the Real Property Limitation Act, 1874 (*k*), and such a trust or charge is not rendered nugatory or affected by s. 2 (3) of the Act of 1897 (*l*).

Distinction between a charge by testator of his own debts and of debts of another person.

Where a testator by his Will charges his real estate with his own debts it is thereby made liable to the payment of them, but the question what constitutes debts is not affected by the charge. If the debt has been barred before the testator's death, the charge does not revive it (*m*).

But as regards the debts of another person the payment of which the testator may have charged on his own real estate, the testator was never liable for them, and so far as he was concerned the statute did not operate in his favour and has no operation. Consequently, where the testator charged his real estate with his father's debts, the question

(*g*) Cunningham *v.* Foot, (1878) 3 App. Cas. 974, 990.

(*h*) Hughes *v.* Wynne, (1823) 1 T. & R. 307.

(*i*) Scott *v.* Jones, (1838) 4 Cl. & F. 382; O'Connor *v.* Haslam, (1855) 5 H. L. C. 170, 177, per Ld. Cranworth.

(*k*) *Re* Stephens, (1889) 43 C. D. 39.

(*l*) *Re* Balls, [1909] 1 Ch. 791; and see *Re* Raggi, [1913] 2 Ch. 206.

(*m*) O'Connor *v.* Haslam, *ubi sup.*; Briggs *v.* Wilson, (1854) 5 De G. M. & G. 12.

is what could be recovered from the father at the father's death (*n*).

For purposes of 3 & 4 Will. IV. c. 27 administrator deemed to claim as though no interval of time between death and grant.

Sect. 6 of 3 & 4 Will. IV. c. 27, which is an Act for the limitation of actions relating to real property, provides "that for the purposes of this Act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." So that time begins to run as against an administrator claiming a chattel interest in land from the date of the death of the intestate, and not from the date of the grant of administration (*o*). The same rule would seem to apply since the Land Transfer Act, 1897, to an administrator claiming real estate. And where a legacy charged on land was bequeathed to an infant who survived the testator and died, it was held that if ever administration were taken out to the infant's estate, time would run as from the death of the infant, since the Act applied to cases arising under s. 40 (for which s. 8 of the Act of 1874 is now substituted), as well as to cases arising under the earlier part of the Act (*p*).

Statute 3 & 4 Will. IV. c. 27 as to arrears of interest.

By s. 42 of 3 & 4 Will. IV. c. 27, only six years of arrears of rent or of interest in respect of any sum charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears, can be recovered unless in the meantime there is an acknowledgment in writing given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent.

Whether acknowledgment by one of several personal representatives will bind real estate.

Where a testator died prior to the commencement of the Land Transfer Act, 1897, it was held that an acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mortage created by their testator cannot be treated as the valid act of the two in their capacity

(*n*) O'Connor *v.* Haslam, (1855) 4 Cl. & F. 382.

(*o*) *Re* Williams, (1886) 34 C. D. 558.

(*p*) *Re* Bonsor & Smith's Contract, (1884) 34 C. D. 560, n.

of trustees, and was not a good acknowledgment within s. 42 of the Real Property Limitation Act, 1833 (*q*).

Analogy of statute as to charge on land inapplicable to personal estate.

A Court of Equity is not under any obligation to follow, as regards personal estate, the analogy of a statute which applies to real estate (*r*); but that staleness of demand, as distinguished from the Statutes of Limitations and analogy to them may furnish a defence in Equity to an equitable claim was settled at least as early as *Smith* v. *Clay* (*s*).

Sect. 42 of 3 & 4 Will. IV. c. 27, has no application in the case of personalty, and in the case of a lien on personal property which is the subject-matter of a sale not only does that statute not apply, but there is no Statute of Limitations which has any application at all, and interest at 4 per cent. per annum is recoverable for the whole period from the date on which the debt was incurred (*t*).

Where a fund in Court is applicable for the payment of a mortgage debt, on an application for payment out the mortgagee is in the same position as if an action for redemption had been brought, and notwithstanding s. 42 of 3 & 4 Will. IV. c. 27 he is entitled to receive full arrears of interest (*u*), provided his title is not extinguished under s. 34 (*x*).

(2) *As to Legacies not charged on Land and Personal Estate of an Intestate.*

When legacy ceases to be such.

A legacy does not cease to be a legacy within the meaning of s. 8 of the Real Property Limitation Act, 1874, merely because it is subject to some implied trust. The Judicature Act, 1873, s. 25 (2) (*y*), excepts only express trusts (*z*). A

(*q*) Astbury *v.* Astbury, [1898] 2 Ch. 111.

(*r*) Smith *v.* Hill, (1878) 9 C. D. 143; Mellersh *v.* Brown, (1890) 45 C. D. 225, 229; and see *Re* Hazeldine's Trusts, [1907] 1 Ch. 686.

(*s*) (1767) 3 Bro. C. C. 639, n.; *Re* Sharpe, [1892] 1 Ch. 154, 168; Brooks *v.* Muckleston, [1909] 2 Ch. 519; and generally with regard to the doctrine of laches see Rochefoucauld *v.* Boustead, [1897] 1 Ch. 196.

(*t*) *Re* Stucley, [1906] 1 Ch. 67.

(*u*) *Re* Lloyd, [1903] 1 Ch. 385.

(*x*) *Re* Hazeldine's Trusts, [1908] 1 Ch. 34.

(*y*) *Ante*, p. 450.

(*z*) *Re* Davis, [1891] 3 Ch. 119.

trust legacy, however, ceases to be a legacy within the meaning of the Act of 1874 when it is severed by the executor from the general estate (*a*).

Commencement of period of limitation.

In an action to recover a legacy the period of limitation is twelve years from the death of the testator and not from the expiration of one year from his death since " a present right to receive " arises on the death of the testator, although the right to sue is postponed until one year after (*b*).

The same period applies to a legacy charged by the Will on a reversionary interest in land of the testator and is not extended to the falling in of the reversion (*c*).

Interest on legacies.

Where all questions as to the Statutes of Limitations are out of the way, legatees who have waited for the payment of their legacies until after the falling in of a reversionary interest are entitled to all arrears of interest from the expiration of one year after the death of the testator (*d*).

Action against administrator to recover personal estate of intestate.

The stat. 23 & 24 Vict. c. 38, s. 13, provides that " After the 31st day of December, 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same (*e*) shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent to the person entitled thereto, or his agent ; and in such case no such action or suit shall be brought but within twenty

(*a*) See Williams (10th ed.) 1659.

(*b*) Waddell *v.* Harshaw, [1905] 1 Ir. R. 416.

(*c*) *Re* Owen, [1894] 3 Ch. 220.

(*d*) *Re* Blachford, (1884) 27 C. D. 676.

(*e*) As to what is a " present right to receive " within this section, see Waddell *v.* Harshaw, *ubi sup.* ; and see *Re* Pardoe, [1906] 1 Ch. 265, but it is submitted, having regard to Hornsey Local Board *v.* Monarch Investment Building Society, (1889) 24 Q. B. D. 1, *Re* Owen, [1894] 3 Ch. 220, and Waddell *v.* Harshaw, *ubi sup.*, this case was wrongly decided. See also same case, [1906] 2 Ch. 340.

years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given."

When next-of-kin has present right to receive a reversionary or outstanding asset.

The next-of-kin have no present right to receive from the administrator a reversionary asset belonging to the intestate before it falls into possession and is possessed by him, nor where he is compelled to take proceedings to recover an outstanding asset, before he recovers it or obtains possession of it (*f*).

Legatees are barred by s. 8 of 37 & 38 Vict. c. 57, after twelve years, but persons claiming under an intestacy are not affected by that Act, and under the Act of 23 & 24 Vict. c. 38, they are only barred after twenty years (*g*), whether the intestacy is partial or entire (*h*).

(3) *As to Claims founded upon a Devastavit.*

Claim upon devastavit.

A claim founded upon a devastavit in distributing the personal estate is barred after six years (*i*).

Executor or administrator cannot set up statute-barred devastavit as defence to legal claim.

Where the action must be framed, and the plaintiff must rely on a devastavit, and six years have elapsed, the Statute of Limitations applies (*k*). But personal representatives cannot set up wrongful payments by way of devastavit as a defence in order to claim the benefit of the Statute of Limitations. For instance, executors having distributed the personal estate among simple contract creditors and beneficiaries, with knowledge of a mortgage debt unsatisfied, the mortgaged property subsequently becoming insufficient, and interest falling into arrear, the executors are liable to account to the mortgagees for the personal estate misapplied (*l*).

Analogy of statute 21 Jac. I. c. 16 inapplicable to breach of trust.

The analogy of the statute of 21 Jac. I. c. 16 does not apply to a liability for a breach of trust. The trustee himself

(*f*) *Re* Johnson, (1885) 29 C. D. 964, 971.

(*g*) Williams (10th ed.) 1658.

(*h*) Willis *v.* Earl Howe, (1880) 43 L. T. 375.

(*i*) Thorne *v.* Kerr, (1855) 2 K. & J. 54; *Re* Gale, (1883) 22 C. D. 820.

(*k*) Lacons *v.* Warmoll, [1907] 2 K. B. 350, 361.

(*l*) *Re* Marsden, (1884) 26 C. D. 783; *Re* Hyatt, (1888) 38 C. D. 609; and see Lacons *v.* Warmoll, *ubi sup.* at p. 367, per Buckley, L.J.

cannot set up the statute, and his personal representative or heir or devisee is in no better position (*m*).

Effect of Trustee Act, 1888, s. 8.

The Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8, provides as follows : (1) " In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded on any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply :—

(*a*) " All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(*b*) " If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation ; but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

(3) " This section . . . . shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing Statute of Limitations."

By s. 1 (3) for the purposes of this Act the expression " trustee " shall be deemed to include an executor or administrator (*n*).

(*m*) Brittlebank *v.* Goodwin, (1868) L. R. 5 Eq. 545, 553 ; Woodhouse *v.* Woodhouse, (1869) L. R. 8 Eq. 514.

(*n*) See *post*, p. 666, as to the effect of this Act.

Before the Trustee Act, 1888, in taking an account against executors at the suit of a creditor payments made to beneficiaries would be disallowed though made more than six years before action, and the Act has made no difference in this respect (*o*).

(*o*) *Re* Blow, [1913] 1 Ch. 358.

CHAPTER XXXII.

OF LEGACIES.

SECT. 1.—*What is a Legacy.*

Definition of "legacy."

A LEGACY is a bequest or gift of goods and chattels by Will or testament; the person to whom it is given is styled the legatee; and if the gift is of the residue of an estate after payment of debts and legacies he is then styled the residuary legatee (*a*).

Formerly "legacy" and "devise" sometimes used synonymously.

In some old reports and text-books the terms legacy and devise are used as synonymous. The definitions given in Termes de la Ley (1721) are as follows:—"Legacy (Legatum) is a term of the Civil Law, and it is that which we in our law call a devise, viz., lands or goods given unto any man by the Will or testament of another." "Devise is, where a man in his testament gives or bequeaths his goods or lands to another after his decease." But at the present day, although words used by a testator may be construed as referring to real estate, yet independently of context "legacy" or "legatee" or "residuary legatee" cannot be understood as applying to anything but personal estate (*b*).

Now "legacy" used as applying to personal estate.

Forgiveness of debt.

Words of remission or forgiveness of a debt amount to a specific legacy which is subject to payment of duty as such (*c*) and to the usual rules of administration which affect all legacies (*d*).

Direction to charge for services.

A direction in a Will authorising a professional man to charge for services for which otherwise he would have no

(*a*) Tomlins' Law Dictionary (4th ed.) (1835) "Legacy."

(*b*) Windus *v.* Windus, (1856) 6 De G. M. & G. 549.

(*c*) Att.-Gen. *v.* Holbrook, (1829) 12 Price, 407.

(*d*) *Re* Wedmore, [1907] 2 Ch. 277.

right to charge operates by way of bounty or legacy (*e*), and it would seem liable to legacy duty (*f*).

Direction for payment of duty on a legacy.

But a direction for payment of duty chargeable upon any legacy, so that the legacy shall be free of duty, notwithstanding the same may be deemed a legacy is not chargeable with duty as a legacy (*g*).

Trust legacies other than for persons.

There may be a valid trust legacy, or direction to executors to apply a sum of money for a particular purpose without there being any person capable, as against the executor, of enforcing it; as, for instance, a legacy to be applied in erecting a monument to the memory of the testator on consecrated or unconsecrated ground, or for the repair of such a monument; or as a provision for the testator's horses and dogs. Such a legacy is not a charity, and provided it is to come to an end within the limits fixed by the rule against perpetuities, it is perfectly valid (*h*).

Legacies payable out of personal estate unless directed to be paid out of mixed fund, then *pro rata*.

In the absence of any other direction contained in the Will, pecuniary legacies are payable solely out of the personal estate. Where a testator bequeaths legacies and then bequeaths the residue of his real and personal estate, the legacies are charged upon the real estate or its proceeds; but they are primarily payable out of the personalty. Where, however, there is a direction to pay legacies out of a mixed fund—as where real and personal estate is given upon trust for sale, and the legacies are directed to be paid out of the proceeds, or without a direction for an absolute conversion, an intention is shown of creating a mixed fund for their payment—the legacies are payable *pro rata* out of the real and personal estate in the event of the ultimate residue being undisposed of (*i*).

(*e*) *Re* White, [1898] 1 Ch. 297; [1898] 2 Ch. 217.

(*f*) Cf. *Re* Thorley, [1891] 2 Ch. 613, and see per Kekewich, J., in *Re* White, *ubi sup.*, at p. 299.

(*g*) 36 Geo. III. c. 52, s. 21. As to what shall be deemed a legacy within the intent of the Act, see s. 7, and Williams (10th ed.) 1770.

(*h*) *Re* Dean, (1889) 41 C. D. 552, 557.

(*i*) Allan *v.* Gott, (1872) L. R. 7 Ch. 439; *Re* Boards, [1895] 1 Ch. 499; *Re* Spencer Cooper, [1908] 1 Ch. 130.

SECT. 2.—*Distinction between General, Specific, Demonstrative, and Pecuniary Legacies.*

General legacy.

A legacy is "general" when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. A legacy is "specific" when it is a bequest of a specified part of the testator's personal estate which is so distinguished. Thus, for example, "I give a diamond ring" is a general legacy which may be fulfilled by the delivery of any ring of that kind; while "I give the diamond ring presented to me by A." is a specific legacy, which can only be satisfied by the delivery of the identical subject (*k*). A specific bequest was defined by Jessel, M.R., in *Bothamley* v. *Sherson* (*l*), as being part of the testator's property itself and a part as distinguished from the whole of the residue. A bequest of all the testator's goods and chattels in a particular place or country, he having property elsewhere, is specific (*m*). So it has been held that a testator may, as between the beneficiaries claiming under his Will, specifically devise his share in freeholds which form part of partnership assets by giving it in a different direction to his general share in the business, and in giving effect to the testator's intention, the business being solvent, the liability to contribute to the partnership debts will be thrown on the testator's general share so as to free the specific legacy (*n*).

Specific legacy.

Effect of s. 24 of Wills Act.

Sect. 24 of the Wills Act in effect provides that descriptions of real or personal property the subject of gift, *primâ facie* refer to and comprise the property answering to the description at the death of the testator. The application of this principle of construction to specific bequests is often attended with considerable difficulty. If, however, according to the true construction of the Will, the subject-matter of the bequest is not a specific sum, security, or investment, but is described in such a manner as to be generic—that is, to pro-

(*k*) Williams (10th ed.) 911, 912.
(*l*) (1875) L. R. 20 Eq. 304.
(*m*) See Williams (10th ed.) 92.
(*n*) *Re* Holland, [1907] 2 Ch. 88.

vide a genus, or class of objects—it may from its very nature be susceptible of increase or diminution during the testator's life; for instance, a bequest by a testator of his Midland Railway stock or of his shares in any particular company (*o*). In such cases the Wills Act requires something more on the face of the Will for the purpose of indicating a contrary intention than the mere circumstance that the subject of the bequest is designated by the pronoun "my" (*p*).

Accretions to specific legacy.

Specific legacies are considered as separated from the general estate and appropriated at the time of the testator's death; consequently from that period, whatever produce accrues upon them belongs to the legatee. Therefore, where there is a specific legacy of stock, the dividends belong to the legatee from the death of the testator (*q*). So, also, bonuses which accrue after the death of the testator (*r*).

Distinction between contingent and vested specific legacies as to accretions.

When a specific legacy is given on the happening of a contingency the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to the residuary legatee, or next-of-kin, as the case may be. But when a specific legacy is vested at once in the legatee, and the enjoyment only is postponed, until the happening of the contingency the interim interest and accretions go to the legatee (*s*).

Duty of executors to preserve specific legacies.

It is the duty of executors, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish: and unless compelled they ought not to apply them to the payment of debts (*t*).

Cost of recovering specific legacies.

It is also the duty of executors to get in all the testator's estate, whether specifically bequeathed or otherwise; and

(*o*) See *Re* Slater, [1906] 2 Ch. 480, 484; [1907] 1 Ch. 665, 670; *Re* Gillins, [1909] 1 Ch. 345 (where after the date of his Will the testator's shares of £50 each had been divided into shares of £10 each), but see *Re* Clifford, [1912] 1 Ch. 29, distinguishing a specific and a general legacy.

(*p*) Per Wood, V.-C. in Goodlad *v.* Burnett, (1854) 1 K. & J. 341, 347. For cases where the larger or narrower interpretation prevailed, see Williams (10th ed.) 1178, n. (*f*); and see also *Re* Evans, [1909] 1 Ch. 784.

(*q*) Williams (10th ed.) 1162.

(*r*) See Maclaren *v.* Stainton, (1859) 27 Beav. 460, 462.

(*s*) Guthrie *v.* Walrond, (1883) 22 C. D. 573, 578.

(*t*) Clarke *v.* Ormond, (1821) Jacob, 108.

the expenses incurred in doing so and remitting the property specifically bequeathed must be paid out of the general estate, as part of the expenses of the administration (*u*). But it would seem that the specific legatee must be charged with the cost of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent (*v*).

Chattels given in succession.

If personal chattels are bequeathed to A. for life, remainder to B., A. will be entitled to the possession of the goods, upon signing and delivering to the executor an inventory of them admitting their receipt, expressing that he is entitled to them for life, and that afterwards they belong to the person in remainder. Security is not now required, unless a case of danger is shown (*x*).

Of things *quæ ipso usu consumuntur.*

A gift for life of things *quæ ipso usu consumuntur*, as corn and wine, if specific, is an absolute gift of the property (*y*).

Specific legacies not liable to abate with general legacies.

On a deficiency of assets, a specific legacy is not liable to abate with general legacies ; on the other hand, if the specific legacy fail by ademption or inadequacy of its subject, the legatee is not entitled to any recompense out of the general personal estate (*z*).

On ademption legatee not entitled to compensation.

Demonstrative legacy, nature of.

A legacy of quantity is ordinarily a general legacy : but there may be legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called a demonstrative legacy. It is so far general that if the fund fail, the legatee will not be deprived of his legacy, but will be permitted to receive it out of the general personal estate ; yet it is so far specific that *quoad* the fund it will not be liable to abate with general legacies upon a deficiency of assets (*a*).

When pecuniary legacy may be specific.

Under some circumstances even pecuniary legacies may be specific, as of a certain sum of money in a certain bag or chest ; or in the hands of A ; or of £200, the balance due to

(*u*) Perry *v.* Medderscroft, (1841) 4 Beav. 197, 204.

(*v*) *Re* Pearce, [1909] 1 Ch. 819.

(*x*) Williams (10th ed.) 1127, and see Conduit *v.* Soane, (1844) 1 Coll. 285 ; Temple *v.* Thring, (1887) 56 L. J. Ch. 767 ; Seton (7th ed.) p. 1559.

(*y*) Williams (10th ed.) 1127.

(*z*) *Ibid.*, 912.

(*a*) *Ibid.*, 913.

the testator from his partner on the last settlement between them, if the testator did not draw such money out of the trade before he died (*b*).

Where sums of money are bequeathed by a testator who has property in England and elsewhere, to persons resident in each place, with a direction that they shall be paid out of the assets in the respective countries, such a direction will not constitute the legacies specific (*c*).

So a debt due to the testator may be specifically bequeathed, but where a legacy is bequeathed out of a debt it will be a demonstrative legacy (*d*).

Again, where a legacy of money is given out of a particular stock, of which the testator was possessed at the date of the Will, without anything expressive of the testator's intention, as where the bequest is of "£1,000 out of my reduced bank annuities three per cents.," the legacy will not be specific but a demonstrative legacy. But if the legacy given had been "of my stock," or "in my stock," or "part of my stock," it would have been a specific gift of an aliquot part of the stock (*e*). So a legacy of "£800 invested in Consols" is *prima facie* specific (*f*).

Specific thing need not exist at date of Will.

There may be a specific bequest of stock, of which a testator is not possessed at the making of his Will but of which he may be possessed at his death (*g*). The Wills Act brings down the specific bequest to the date of the testator's death (*h*).

Every devise of land is specific.

Every devise of land is specific; and a residuary devise remains specific notwithstanding s. 24 of the Wills Act, which makes the Will speak as if it had been executed immediately before the death of the testator (*i*).

General legacies charged upon

General legacies do not become specific because they are charged upon, or payable out of, the proceeds of real

(*b*) Williams (10th ed.) 914; and see *Re* Grainger, [1900] 2 Ch. 756.

(*c*) Williams (10th ed.) 914.

(*d*) *Ibid.*, 921; Campbell *v.* Graham, (1830) 1 R. & M. 453.

(*e*) Williams (10th ed.) 918; Kirby *v.* Potter, (1799) 4 Ves. 748, 750.

(*f*) *Re* Pratt, [1894] 1 Ch. 491.

(*g*) Williams (10th ed.) 919.

(*h*) Bothamley *v.* Sherson, (1875) L. R. 20 Eq. 304.

(*i*) Hensman *v.* Fryer, (1867) L. R. 3 Ch. 420; Lancefield *v.* Iggulden, (1874) L. R. 10 Ch. 136.

estate (*k*). But a testator in directing payment to persons of sums out of the proceeds of real estate may show an intention that these persons should take as specific legatees an aliquot part of such proceeds (*l*). So if a testator simply charges his real estate with a sum of money, and then bequeaths the money so charged, the real estate alone is liable to the payment (*m*).

or payable out of proceeds of sale of land.

If a specific interest is given in a real or personal estate, it will not be affected by a general charge of legacies; for where there is a specific legacy or devise, the presumption is that it is the intention of the testator that the legatee or devisee shall have it in its integrity, and a general charge, which in terms may comprehend the specific bequest or devise, is not sufficient of itself to show an intention to take it away (*n*).

Specific interest in real or personal estate not affected by a general charge thereon of legacies.

The fact that a specific legacy is given, or a specific part of the personalty excepted, out of a general residue, does not make a gift of that general residue specific (*o*). Nor is a general residuary clause the less general because it contains an enumeration of some of the particulars of which it may consist (*p*).

Effect on general residuary clause by exception of specific parts or enumeration of some particulars.

Sect. 3.—*Of Cumulative Legacies.*

Whether or not a second legacy to a legatee is to be regarded as a mere repetition of the first bequest or as an additional and cumulative benefit seems to be governed by the following rules of construction (*q*) :—

1st. Where there is no internal evidence of intention, the following propositions of law appear to be established :—

Where there is no internal evidence of intention.

I. If the same specific thing is bequeathed twice to the

Same specific thing given twice.

(*k*) Williams (10th ed.) 922.

(*l*) Page *v.* Leapingwell, (1812) 18 Ves. 463; and see *post*, p. 582.

(*m*) Dickin *v.* Edwards, (1844) 4 Hare, 273, 276.

(*n*) Conron *v.* Conron, (1858) 7 H. L. C. 168.

(*o*) *Re* Ovey, (1882) 20 C. D. 676; S. C. *sub nom.* Robertson *v.* Broadbent, (1883) 8 App. Cas. 812.

(*p*) Williams (10th ed.) 925; and see Theobald on Wills (7th ed.) 226 as to when, after enumerating particulars, general words may be restricted to things *ejusdem generis*.

(*q*) Williams (10th ed.) 1035 *et seq.*; Hooley *v.* Hatton, (1773) 1 Bro. C. C. 390, n., referred to in Wilson *v.* O'Leary, (1871) L. R. 12 Eq. 525, 531.

same legatee in the same Will, or in the Will and again in a codicil, in that case he can claim the benefit only of one legacy, because it could be given no more than once.

Two legacies of quantity of equal amount in same instrument.

II. Where two legacies of quantity of equal amount are bequeathed to the same legatee in one and the same instrument, there also the second bequest is considered a mere repetition, and he shall be entitled to one legacy only (*r*).

Two legacies of quantity of unequal amount in same instrument.

III. Where two legacies of quantity of unequal amount are given to the same person in the same instrument, the one is not merged in the other, but the latter shall be regarded as cumulative, and the legatee is entitled to both (*s*).

Two legacies given by different instruments.

IV. Lastly, where two legacies are given *simpliciter* to the same legatee by different instruments, in that case, also, the presumption is, that the latter is cumulative, whether its amount be equal or unequal to the former (*t*).

Where there is internal evidence of intention.

2ndly. Where there is internal evidence of the intention of the testator.

In these cases it becomes a question of construction. A codicil is professedly an addition to the Will (*u*), but a codicil may be a mere copy of another and intended as a substitution (*x*). Where there are two instruments, and the testator calls both his last Will, and they are both admitted to probate, still the general scope of both must be looked at to see if substitution is intended (*y*).

Two legacies in different instruments of equal amount, with same motive expressed.

If in two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both the instruments the same motive is expressed, and the same sum is given, the Court considers the two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. The Court raises this presumption only where

(*r*) See also Hubbard *v.* Alexander, (1876) 3 C. D. 738.

(*s*) See also Curry *v.* Pile, (1787) 2 Bro. C. C. 225.

(*t*) See also Wilson *v.* O'Leary, (1872) L. R. 7 Ch. 448, 454.

(*u*) Cresswell *v.* Cresswell, (1868) L. R. 6 Eq. 69.

(*x*) Chichester *v.* Quatrefages, [1895] P. 186.

(*y*) Tuckey *v.* Henderson, (1863) 33 Beav. 174; In the Estate of Bryan, [1907] P. 125, 128.

the double coincidence occurs of the same motive and the same sum in both instruments. It will not raise it if in either instrument there be no motive, or a different expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different (*z*).

Two legacies in different instruments of unequal amount with same motive expressed.

Where Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, they will receive evidence to repel that presumption, so that where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed (*a*).

Evidence admissible to prove testator intended double gift.

Sect. 4.—*Of Substituted and Added Legacies.*

As a general rule where one legacy is given as a mere substitution for another, the substituted gift is subject to the incidents of the original one, although it is not so expressed in the testamentary instrument (*b*).

Legacy given in substitution subject to same incidents,

So added legacies shall, generally speaking, be subject to the same conditions and incidents as those to which they are added (*c*).

also added legacies.

But although this is the general rule, the Courts do not follow it where its effect would be to introduce such limitations as would convert a gift in its terms absolute into one of a life estate only, and it would seem there is no authority for applying the rule to a case where the beneficiaries in a codicil are not identical with the beneficiaries in the Will, or to any but the simple case where the alteration is intended to apply to the amount of the legacy only (*d*).

Restriction on the rule.

With regard to added legacies, if the testator directs that the legacies in the body of his Will shall be free of legacy duty,

(*z*) Hurst *v.* Beach, (1819) 5 Madd. 351, 358.

(*a*) *Ibid.*

(*b*) Williams (10th ed.) 1040; and see *Re* Boddington, (1884) 25 C. D. 685, 689, per Ld. Selborne.

(*c*) Williams (10th ed.) 1041.

(*d*) *Re* Boden, [1907] 1 Ch. 132, 149, per Fletcher Moulton, L.J.; *Re* Joseph, [1908] 2 Ch. 507.

and at a later date adds a codicil giving pecuniary legacies *simpliciter*, without any provision as to payment of legacy duty, there would seem to be no presumption that if one of the legatees under the codicil happens to be a legatee under the Will his legacy under the codicil is to be paid free of legacy duty while the others are not (*e*).

(*e*) *Re* Boden, [1907] 1 Ch. 132, 150.

CHAPTER XXXIII.

OF THE FAILURE OF DEVISES AND BEQUESTS.

SECT. 1.—*Of Lapse.*

Legatee must survive testator.

UNLESS the legatee survives the testator the legacy given to him is extinguished (*a*).

There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause, nor that all died at the same time. The question of survivorship is a question of fact to be established by positive evidence and the *onus probandi* is on the person asserting the affirmative (*b*). If a person has not been heard of for seven years there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, and the *onus* is on the person who claims a right to the establishment of which that fact is essential (*c*).

Except where legacy intended in discharge of a moral obligation and not mere bounty.

The cases of *Williamson* v. *Naylor* (*d*), *Philips* v. *Philips* (*e*) and *Re Sowerby's Trust* (*f*), have established the rule that, if the Court finds, upon the construction of the Will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse (*g*).

(*a*) Williams (10th ed.) 955.

(*b*) Underwood *v.* Wing, (1855) 4 De G. M. & G. 633; Wing *v.* Angrave, (1860) 8 H. L. C. 183.

(*c*) *Re* Phené's Trusts, (1869) L. R. 5 Ch. 139, 152; *Re* Rhodes, (1887) 36 C. D. 586; *Re* Benjamin, [1902] 1 Ch. 723; *Re* Aldersey, [1905] 2 Ch. 181; and see *ante*, p. 82.

(*d*) (1838) 3 Y. & Coll. Ex. 208.

(*e*) (1844) 3 Hare, 281.

(*f*) (1856) 2 K. & J. 630.

(*g*) Stevens *v.* King, [1904] 2 Ch. 30.

Addition of " and his executors, administrators and assigns " does not prevent lapse, but the word " or " may imply substitution.

Although the addition to the name of the legatee of the words " and his executors, administrators and assigns " will not prevent a lapse should the legatee die in the lifetime of the testator, such words being considered words of limitation only (*h*), yet where there is a bequest to A. " or his personal representatives," or to A. " or his heirs," the word " or," generally speaking, implies a substitution so as to prevent a lapse (*i*).

Substitutionary gift to issue, following a class gift, to be effectual parent must be living at date of Will.

The law was settled in the case of *Christopherson* v. *Naylor* (*k*) that where there is a gift to a class and then a substitutionary gift to issue of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and, consequently, if the parent was dead at the date of the Will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift (*l*).

Secus, where there is an original substantive gift to the two classes of legatees.

Where, however, there is an original substantive gift to two classes of legatees, first, to the children of a legatee for life, living at the time of his decease ; and, secondly, to the issue of such of them as shall be then dead leaving issue, the issue of a child who was dead at the date of the Will may be entitled to a share (*m*).

Gift not to be construed contingent unless context requires it.

A gift is never to be construed as contingent unless the context requires it : consequently, where there is a gift to children as should be living at the death of a tenant for life, but if any should then be dead leaving issue such issue should be entitled to their parent's share, the fact that the gift to the parent was contingent does not affect the gift to the issue,

(*h*) See *post*, p. 630.

(*i*) Williams (10th ed.) 959 ; and see *ante*, p. 275.

(*k*) (1816) 1 Mer. 320.

(*l*) Per Kay, J., in *Re* Webster's Estate, (1883) 23 C. D. 737 ; and see *Re* Wood, [1894] 3 Ch. 381, 387 ; *Re* Gorringe, [1906] 1 Ch. 319 ; [1906] 2 Ch. 341 ; [1907] A. C. 225 ; *Re* Cope, [1908] 2 Ch. 1 ; but cf. *Re* Lambert, [1908] 2 Ch. 117 ; *Re* Metcalfe, [1909] 1 Ch. 424.

(*m*) Williams (10th ed.) 960, referring to Tytherleigh *v.* Harbin, (1835) 6 Sim. 329, and other cases.

which is an independent gift, and issue of a child dying before the tenant for life would take a vested interest, although such issue should die before the tenant for life (*n*).

Rule as to lapse applies to appointment under testamentary power.

The rule as to lapse in the event of the legatee dying in the lifetime of the testator is equally applicable to an appointment under a testamentary power (*o*).

No lapse in case of joint tenants.

Where a legacy is given to two persons as joint tenants, and one of the legatees dies in the lifetime of the testator, the entire legacy goes to the survivor, and consequently there is no lapse.

Effect of express gift over to survivors.

Moreover, there is no lapse by the death of a legatee in the lifetime of the testator where the Will contains an express limitation over to survivors (*p*). Whether accruing as well as original shares pass under a survivorship clause in a Will depends on whether the testator intended the disposition as of an aggregate fund or of separate legacies (*q*).

Lapse in case of tenants in common, unless a class gift.

If the legatees take as tenants in common, and one of the legatees dies in the lifetime of the testator, his share will lapse unless the legacy is given to them as a class gift, in which case those of the described class who survive the testator take the whole (*r*).

What constitutes a class gift.

Primâ facie, a class gift is a gift to a class consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator. But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made to all my nephews and nieces including A., or to C. and all other my nephews and nieces, or to four named daughters of the testator and all his afterborn daughters, or to the testator's niece A. and the child or children of his sister B. who should attain the age of twenty-one years equally to be

(*n*) Martin *v.* Holgate, (1866) L. R. 1 H. L. 175; *Re* Woolley, [1903] 2 Ch. 206.

(*o*) Oke *v.* Heath, (1748) 1 Ves. Sen. 135.

(*p*) Mackinnon *v.* Peach, (1838) 2 Kean, 555; Williams (10th ed.) 966.

(*q*) Worlidge *v.* Churchill, (1792) 3 Bro. C. C. 465; Williams (10th ed.) 966. As to the meaning of "survivor," see *Re* Bowman, (1889) 41 C. D. 525, 531; King *v.* Frost, (1890) 15 App. Cas. 548; Inderwick *v.* Tatchell, [1901] 2 Ch. 738.

(*r*) See Williams (10th ed.) 963.

divided among them as tenants in common, in all these cases there would be a class gift (*s*). So also a revocation in the case of one person who is a presumptive member of the class has the effect of excluding that member from the class, but does not prevent the gift having effect as a class gift (*t*). And where there is a class gift of residue and the share of a member of the class is settled, and on failure of his issue the settled share is directed to fall again into residue, the other members of the class become entitled to the settled share to the exclusion of the member whose share is so settled (*u*).

Composite class.

There may also be a composite class, such as, for instance, children of A. and children of B. On the other hand, a gift to A. and all the children of B. is *primâ facie* not a class gift (*x*).

All interests must vest at same time.

Another principle is that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A. for life and afterwards to B. and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life.

On the other hand, a gift to A. for life and at his death to be equally divided between his surviving children and the testator's niece Rosamund, is not a class gift since only those children who survived the tenant for life would have taken, whereas Rosamund's interest would have become vested at the testator's death. But if the gift were to A. for life and at his death the property to be equally divided amongst his children and the testator's niece Rosamund, or such of them as shall survive the tenant for life, making them all vested interests at the same time, it would be a class gift (*y*).

Effect of rule against perpetuities in class gifts.

If a fund is given in trust for a class, some of the members of which may by possibility attain vested interests in it after the period limited by the rule against perpetuities, the gift is

(*s*) Kingsbury *v.* Walter, [1901] A. C. 187, 192.

(*t*) *Re* Dunster, [1909] 1 Ch. 103; and cf. *Re* Whiting, [1913] 2 Ch. 1.

(*u*) *Re* Palmer, [1893] 3 Ch. 369; *Re* Parker, [1901] 1 Ch. 408; *Re* Allan, [1903] 1 Ch. 276; *Re* Wand, [1907] 1 Ch. 391.

(*x*) Kingsbury *v.* Walter, *ubi sup.*

(*y*) *Ibid.*, at p. 194.

void not only as regards them, but also as regards all the members of the class. The principle is that you cannot ascertain the share of any member of the class without taking into account the members born after the expiration of the legal period ; the rights of all the members of the class would be affected by the consideration whether or not some of them were born within the legal period. But this reasoning does not apply where the question is not as to the amount of the share or the period when the class is to be ascertained, but only as to a mere restriction which is to apply to each share as and when it comes into existence (*z*).

For instance, it has been held that a proviso for settlement of shares must be construed as applicable to each share separately, and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of a daughter born in his lifetime, and that she was entitled to a life interest in the fund (*a*) ; and a provision that the daughter should take without power of anticipation is also valid (*b*).

Prevention of lapse by direction to retain share upon specified trusts.

Where there is a gift of a share of residue to a legatee with a direction that the share shall be retained by the trustees and held upon specified trusts, and the legatee predeceases the testator, the question may arise whether by the expression " the share " was meant an aliquot part of the estate, or the share which the legatee would have taken had he survived the testator. In the former case it would be subject to the trusts, but in the latter it would lapse by the death of the legatee. In ascertaining the sense in which the words are used the whole Will must be regarded (*c*).

Effect of s. 33 of Wills Act.

Sect. 33 of the Wills Act provides " that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death

(*z*) *Re* Game, [1907] 1 Ch. 276, 280.
(*a*) *Re* Russell, [1895] 2 Ch. 698.
(*b*) *Re* Game, *ubi sup.*
(*c*) *Re* Roberts, (1885) 30 C. D. 234 ; *Re* Pinhorne, [1894] 2 Ch. 276 ; *Re* Powell, [1900] 2 Ch. 525 ; *Re* Whitmore, [1902] 2 Ch. 66.

of such person shall die in the lifetime of the testator leaving issue and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will."

The section being inapplicable to gifts to collaterals, any attempt by Will to extend it to collaterals, without a substitutionary gift to their legal personal representatives, would be ineffectual (*d*). But there may be a good substitutionary gift in favour of the person or persons who would have taken if the legatee had survived the testator and died immediately afterwards (*e*).

Legatee taken to have survived testator.

Under this section, for all the purposes of the Will, the legatee must be taken to have survived the testator (*f*).

Legatee competent to dispose of the property in his lifetime.

If the child or other issue, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound; so also if he made a Will by which such property is, by appropriate language, disposed of, either specifically or otherwise, the property will pass under such disposition (*g*); and being property of which he was competent to dispose of it is liable to estate duty as property passing on his death (*h*).

Section applies to testamentary appointments under general but not under limited powers.

Although this section applies to a testamentary appointment in the exercise of a general power, by reason of s. 27, which makes the subject of a general power part of the property of the testator, yet it does not apply to an appointment under a special power (*i*).

Section does not apply to class gifts.

Further, this section has no application to a gift to

(*d*) *Re* Gresley's Settlement, [1911] 1 Ch. 358.

(*e*) *Re* Greenwood, [1912] 1 Ch. 392.

(*f*) *Re* Hone's Trusts, (1882) 22 C. D. 663.

(*g*) *Re* Scott, [1901] 1 K. B. 228, 239.

(*h*) *Ibid.*

(*i*) Holyland *v.* Lewin, (1884) 26 C. D. 266, 272; and cf. *Re* Griffiths' Settlement, [1911] 1 Ch. 246.

children or other issue as a class (*k*) ; even though, in the events which happen, the class should consist of but one individual (*l*).

Sect. 2.—*Of Disclaimer.*

Where gifts are distinct legatee may disclaim the onerous and take benefit, *secus*, where gifts are not distinct :

Where there are two distinct gifts to the same person, one being onerous and the other beneficial, *primâ facie* the donee may disclaim the onerous gift and take the other (*m*). If, however, onerous property and beneficial property are included in the same gift, *primâ facie* the legatee cannot disclaim the onerous and accept the beneficial, he must take the whole gift or none. But this *primâ facie* rule may be rebutted if the Will manifests a sufficient intention of the testator to the contrary (*n*).

unless context shows contrary intention.

General devise and bequest upon trust for persons in succession treated as one aggregate property.

Where a testator gave all his real and personal estate, without reference to specific parts, to trustees upon trust for a tenant for life and remainderman, and one estate included in the gift was unincumbered and another incumbered, it was held that the equitable tenant for life could not accept the unincumbered estate and refuse the other and that for the purpose of the construction of the Will it must be treated as one aggregate property given to her for her life, and the interest upon the charges on any part ought to be paid out of the aggregate income of the whole (*o*).

So leaseholds given upon same trusts as freeholds devised in strict settlement.

So where freehold property is devised in strict settlement and leaseholds are given on the same trusts, the gift is, so far as the difference in the nature of freeholds and leaseholds will admit, given as one with the freeholds. The division of the gifts into two is simply a proper mode of conveyancing in carrying out one aggregate gift to the same persons so far as the law will allow. What is given is the net result of the whole. Therefore since Locke King's Acts the aggregate charges are by the collective devise thrown on the aggregate

(*k*) Olney *v.* Bates, (1855) 3 Drew. 319 ; Browne *v.* Hammond, (1859) Johns. 210 ; *Re* Harvey (Sir E.), [1893] 1 Ch. 567.

(*l*) *Re* Harvey (Sir E.), *ubi sup.*

(*m*) Guthrie *v.* Walrond, (1883) 22 C. D. 573 ; *Re* Loom, [1910] 2 Ch. 230.

(*n*) Guthrie *v.* Walrond, *ubi sup.* ; *Re* Hotchkys, (1886) 32 C. D. 408.

(*o*) *Re* Hotchkys, *ubi sup.*

lands in exoneration of the testator's personal estate (*p*), and the tenant for life is bound out of the whole rents and profits to keep down the interest on charges on all the estates (*q*).

Application of rule depends on construction of Will.

The same rule will apply although the gifts are in two different parts of the Will and of such absolutely distinct natures as a leasehold house and an annuity, if, on the construction of the Will, the Court determines that it is the intention (*r*).

A disclaimer, until acted on, may be retracted (*s*).

Sect. 3.—*Of Election.*

Principle stated.

The foundation of election is that no one shall claim under and in opposition to the same instrument (*t*). The main principle is that there is an obligation on him who takes under a Will or other instrument to give full effect to that instrument under which he takes a benefit ; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect (*u*).

A doctrine of compensation.

The doctrine of election is sometimes called the doctrine of compensation (*x*). If a person whose property a testator affects to give away, takes other benefits under the same Will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives (*y*).

Obligation confined to confirming

The obligation, however, is confined to confirming the

(*p*) *Re* Baron Kensington, [1902] 1 Ch. 203.

(*q*) Frewen *v.* Law Life Assurance Society, [1896] 2 Ch. 511 ; Honywood *v.* Honywood, [1902] 1 Ch. 347.

(*r*) Per Farwell, J., in *Re* Baron Kensington, *ubi sup.*, at p. 209.

(*s*) *Re* Young, [1913] 1 Ch. 272.

(*t*) Sug. on Powers (8th ed.) p. 576.

(*u*) Per Ld. Hatherley in Cooper *v.* Cooper, (1874) L. R. 7 H. L. 53, 69.

(*x*) Pickersgill *v.* Rodger, (1876) 5 C. D. 163, 173.

(*y*) Rogers *v.* Jones, (1876) 3 C. D. 688.

instrument so far as he is able. The equities of the parties must be determined according to the state of circumstances as they existed at the testator's death, and if at that time there is nothing which he can give up, no case of compensation can arise, as there is no choice and he merely takes under the Will (*z*).

Will according to circumstances at death of testator.

In applying the doctrine it makes no difference whether the person on whom the obligation rests to make compensation derived his title directly under the Will of the testator or by virtue of s. 33 of the Wills Act (1 Vict. c. 26) as being a child of a legatee who has died in the lifetime of the testator (*a*).

Rule applies whether legatee entitled directly under Will or indirectly by virtue of s. 33 of Wills Act.

A devisee claiming by the Will is not precluded from enjoying a derivative interest to which he is entitled at law under a legal estate taken in opposition to the Will; thus, a husband may be tenant by the curtesy of the estate tail held by his wife against a Will under which he accepts benefits (*b*).

Person taking at law derivative interest, *e.g.*, tenant by the curtesy, not put to his election.

The doctrine applies whenever a testator gives property by design or by mistake which is not his to give, and gives at the same time to the real owner of it other property (*c*).

Doctrine applies whether testator acted by design or by mistake.

The principle has been applied where the first gift is made purporting to be in execution of a power, so that, if under a power to appoint to children, the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment also take under the Will other property, the grandchildren are entitled to put them to an election. But the rule is applied only as between a gift under a Will and a claim *dehors* the Will, and adverse to it, and is not to be applied as between one clause in a Will and another clause in the same Will. Consequently, where a testator by his Will exercised a power of appointment over a settled fund in a manner which as to portion of the fund was void for remoteness, and made

Principle applies to invalid appointment under power.

(*z*) *Re* Lord Chesham, (1886) 31 C. D. 466.

(*a*) Pickersgill *v.* Rodger, *ubi sup.*

(*b*) Dillon *v.* Parker, (1818) 1 Swan. 359, 408, n.; but see per Ld. Hatherley in Cooper *v.* Cooper, (1874) L. R. 7 H. L. 53, 69.

(*c*) Wollaston *v.* King, (1869) L. R. 8 Eq. 165, 173.

a valid residuary appointment of the fund, which took up the portion badly appointed, the residuary appointees were allowed to retain both benefits, because they took both as appointees under the Will itself without calling in aid any other instrument or any adverse title (*d*).

Doctrine not applied to enable testator to evade rule founded on public policy, *e.g.*, rule against perpetuities.

Where a Will exercises a power under a settlement and disposes also of the testator's own property, in applying the doctrine of election it is material to consider whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. The doctrine will not be applied for the purpose of enabling the testator to evade a rule of law founded on public policy, as for instance the rule against perpetuities (*e*), or the rule against double possibilities (*f*).

Effect of M. W. P. Act, 1882.

The Married Women's Property Act, 1882 (ss. 1 (1), 5), has removed the difficulty which previously existed with regard to a married woman raising a case of election so as to defeat her husband's marital rights to property (*g*).

Doctrine not applied where Will contains particular intention rebutting presumption of general intention.

Effect where gift is to a married woman without power of anticipation.

The doctrine of election rests on the presumption of a general intention in the author of an instrument that effect shall be given to every part of it, but this presumption is rebutted by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention, as for instance where the benefits which a married woman derives under the instrument which puts her to her election are expressed to be without power of anticipation, for under such circumstances if the doctrine of election and compensation applied she would be depriving herself of the benefit of that which the testator intended should be inalienable during coverture (*h*).

In *Hamilton* v. *Hamilton* (*i*), North, J., decided that a benefit given to a married woman without power of anticipation would be available for compensating others disappointed

(*d*) Wollaston *v.* King, (1869) L. R. 8 Eq. 165.

(*e*) *Re* Oliver's Settlement, [1905] 1 Ch. 191; *Re* Beale's Settlement, [1905] 1 Ch. 256; *Re* Wright, [1906] 2 Ch. 288.

(*f*) *Re* Nash, [1910] 1 Ch. 1.

(*g*) *Re* Harris, [1909] 2 Ch. 206.

(*h*) *Re* Vardon's Trusts, (1885) 31 C. D. 275.

(*i*) [1892] 1 Ch. 396.

by her election on the restraint ceasing by the death of her husband in her lifetime. But in *Haynes* v. *Foster* (*k*) Kekewich, J., held that the restraint on anticipation showed an intention inconsistent with the application of the doctrine at all, and therefore such intention was not limited or affected by the married woman subsequently becoming discovert.

Incapacity arising from infancy or coverture not sufficient to exclude doctrine.

Mere personal incapacity arising from infancy or coverture on the part of the person put to his or her election is not sufficient to exclude the application of the doctrine, as in such cases the Court will make the election for the benefit of the infant or married women, and bind the interest of the party entitled to set up a paramount title by an appropriate declaration (*l*).

Intention of testator must be manifest.

The intention of the testator to dispose of property which is not his must be manifest, and it is difficult to apply the doctrine of election when the testator has some interest in the estate disposed of though not entirely his own (*m*).

Effect of general devise or bequest.

So a general devise or bequest is insufficient to show an intention to include therein the property of another person, and evidence of intention in this respect *dehors* the Will is inadmissible (*n*).

Doctrine applicable to all inconsistent interests whether immediate or contingent.

The doctrine of election is applied to interests in respect, not of their amount, but of their inconsistency with the testator's intention, and therefore it is applicable alike to interests immediate, remote, contingent, of value, and not of value (*o*).

What amounts to an election.

The acts of a party bound to elect between two inconsistent rights in order to constitute election must imply a knowledge of the rights and an intention to elect; possession being under the circumstances equivocal, as referable to either right, but the execution of deeds containing recitals of the character in which the party claimed and the exercise of a power to dispose of the estates in that character, amount to conclusive evidence of election (*p*).

(*k*) [1901] 1 Ch. 361.

(*l*) *Re* Ld. Chesham, (1886) 31 C. D. 466, 472.

(*m*) Dillon *v.* Parker, (1818) 1 Swan. 359, 402, n.

(*n*) *Ibid.*; Clementson *v.* Gandy, (1836) 1 Keen, 309.

(*o*) Dillon *v.* Parker, *ubi sup.*, 407, n.

(*p*) Dillon *v.* Parker, *ubi sup.*

Amount of compensation ascertained as at death of testator.

The amount of compensation payable to the persons disappointed by the election is to be ascertained as at the date of the death of the testator, and not as at the time when the election is made (*q*). Where the person electing to renounce the Will has been in possession, there must be a retrospective account of rents and profits, and an account of sums expended for melioration of the estate, which must be reimbursed (*r*).

Persons electing against Will must compensate others also so electing.

Persons electing against the Will must compensate others also so electing against the Will, and the compensation paid to the latter must be included in the benefits received by them under the Will (*s*).

Sect. 4.—*Of Invalid Devises and Bequests.*

(1) *Bequest to attesting witness or to his or her wife or husband.*

With regard to Wills made on or after 1st January, 1838, s. 15 of the Wills Act, 1837 (1 Vict. c. 26), enacts "That if any person shall attest the execution of any Will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such Will, or the wife or husband of such person, or any person claiming under such person or wife or husband be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such Will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such Will."

Bequest void notwithstanding other sufficient attesting witnesses.

This statute makes void a devise or bequest to an attesting witness although there are sufficient other attesting witnesses to the Will (*t*).

(*q*) *Re* Hancock, [1905] 1 Ch. 16.
(*r*) Gretton *v.* Haward, (1818) 1 Swan. 409, 434; *Re* Hancock, *ubi sup.*
(*s*) *Re* Booth, [1906] 2 Ch. 321.
(*t*) Wigan *v.* Rowland, (1853) 11 Hare, 157.

When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete ; and if a third person afterwards adds his name, the Court will not come to the conclusion, without cogent evidence, that that third person signed as an attesting witness. If the name is not the name of an attesting witness, it is not a part of the Will, and ought not to appear in the probate (*u*).

Attestation must be of same instrument whereby beneficial interest is given.

The attestation must be of the same instrument whereby the beneficial interest is given. Consequently, a bequest of a legacy by a Will is not void because the legatee attests a codicil which gives him nothing, nor does a residuary legatee lose his title by attesting a codicil which by revoking legacies indirectly benefits him by increasing the residue (*x*).

Void gift made effectual by republication by codicil.

Although a gift by a valid Will to an attesting witness is void, such gift may be rendered effectual if the Will is republished by a codicil referring to the Will, but not attested by the legatee, and this benefit will not be lost to the legatee by his subsequent attestation of a second codicil (*y*).

Gift not void by subsequent marriage to attesting witness.

A benefit given by a Will is not rendered void under s. 15 of the Act by the subsequent marriage of the beneficiary to an attesting witness (*z*).

Interest given must be a beneficial interest.

To come within s. 15 the interest given to the attesting witness, or his or her wife or husband, must be a beneficial interest ; a devise or bequest to an attesting witness as trustee, either for others named (*a*), or for the purpose merely of directing the disposition of the legacy (*b*), is not void under the section.

Effect of void gift on construction.

The benefit given to the attesting witness or to his or her wife or husband, although invalidated by s. 15, is not to be treated, for the purpose of construction in ascertaining the interests of other beneficiaries under the Will, as struck out of

(*u*) In the Goods of Sharman, (1869) L. R. 1 P. & D. 661, 663.

(*x*) Gurney *v.* Gurney, (1855) 3 Dr. 208.

(*y*) *Re* Trotter, [1899] 1 Ch. 764.

(*z*) Thorpe *v.* Bestwick, (1881) 6 Q. B. D. 311.

(*a*) In the Goods of Ryder, (1843) 2 N. C. 462.

(*b*) Cresswell *v.* Cresswell, (1868) L. R. 6 Eq. 69.

the Will. The proper way of dealing with these cases is first to construe the Will and ascertain what interests are given, and then to apply s. 15 of the Act. In some cases the effect of the section has been held to create an intestacy as to the benefit which fails (*c*), and in other cases interests in remainder have been held to be accelerated by the failure of the prior void life interest (*d*). In construing class gifts the rule would seem to be that those members of the class who are at the testator's death capable of taking take the whole, and that those who become incapable of taking, whether by dying in the testator's lifetime or by attesting the Will or by some other operation of law are excluded (*e*).

(2) *Gifts tending to a Perpetuity.*

Gifts tending to a perpetuity void, unless charitable.

A gift which may endure or is inalienable for a period exceeding a life or lives in being and twenty-one years afterwards is a perpetuity which the policy of the law does not allow, and unless it can be supported as a charitable bequest it is void (*f*). For instance, a gift for the perpetual repair of a particular tomb or vault in a churchyard is not a charity and is void (*g*) ; so is a gift for ever for keeping up a building of no public benefit and for a merely private purpose (*h*), or a gift of a perpetual annuity to the person, who, for the time being, shall hold a particular office, as to the custodian for the time being of such a building as above mentioned (*i*), are void gifts. But a condition may be imposed on a legatee during

(*c*) *Re* Townsend's Estate, (1886) 34 C. D. 357 ; Alpin *v.* Stone, [1904] 1 Ch. 543.

(*d*) Jull *v.* Jacobs, (1876) 3 C. D. 703 ; *Re* Clark, (1885) 31 C. D. 72.

(*e*) *Re* Coleman & Jarrow, (1876) 4 C. D. 165.

(*f*) As to the canon of construction in considering whether a trust is void for perpetuity, see *Re* Hume, [1912] 1 Ch. 693 ; *Re* Fane, [1913] 1 Ch. 404. See also *post*, pp. 498, 530, as to gifts void for remoteness. A gift to named persons as shall be living when a limitation in tail determines, and the children who, being male, attain twenty-one or being female, attain twenty-one or marry, of such of the named persons as shall then be dead, is valid : *Re* Haygarth, [1912] 1 Ch. 510.

(*g*) Hoare *v.* Osborne, (1866) L. R. 1 Eq. 585, 588 ; and see *Re* Vaughan, (1886) 33 C. D. 187, 190.

(*h*) Thomson *v.* Shakespeare, (1859) John. 612.

(*i*) *Ibid.*

his life to keep the testator's vault in repair, as it does not tend to a perpetuity (*k*).

Effect of gift to a perpetual institution not charitable.

Effect of gift for the benefit of individual members of a perpetual association.

But a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please ? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift or which by reason of the constitution of the association in whose favour it is made tends to a perpetuity, the gift is bad (*l*).

In applying this principle it was held in *Re Clarke* (*m*) that a bequest " to the Committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to that corps " did not tend to create a perpetuity and was a good gift.

Gift to charity upon a future and uncertain event.

A gift in trust for charity, conditional upon a future and uncertain event, is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises ; if it is so remote and indefinite as to transgress the rules of law against perpetuities, the gift fails *ab initio* (*n*).

Immediate charitable bequest not void because particular application may never take effect.

Where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect, or will not of necessity take effect within any definite limit of time, and may never take effect at all. Where, therefore, a testatrix directed that when and as soon as land should at any time be given for the purpose moneys bequeathed by her should be expended in the erection of almshouses, it was held

(*k*) Lloyd *v.* Lloyd, (1852) 2 Sim. (N. S.) 255, 264 ; *Re* Dean (1889) 41 C. D. 552, 557.

(*l*) Per Byrne, J., in *Re* Clarke, [1901] 2 Ch. 110, 114 ; and see *post*, p. 494.

(*m*) [1901] 2 Ch. 110.

(*n*) Chamberlayne *v.* Brockett, (1872) L. R. 8 Ch. 206, 211 ; *Re* University of London Medical Sciences Institute Fund, [1909] 2 Ch. 1.

that this was not a conditional and contingent gift, but was an absolute immediate gift to charity, the mode of execution only being made dependent on future events (*o*).

Effect of gift from one charity to another in a certain event.

The rule against perpetuities has no application to a transfer, in a certain event, of property from one charity to another (*p*), consequently, although a gift for keeping in repair a family vault in a cemetery is void, yet a gift to the trustees of a charity with a gift over to another charity, on the first donees failing to comply with the request to keep in repair the family vault, is good (*q*).

Effect of immediate gift to private individual followed by executory gift over to charity, or *vice versa*.

The principle that the rule against perpetuities has no application to the transfer, in a certain event, of property from one charity to another, does not extend to cases where an immediate gift in favour of private individuals is followed by an executory gift in favour of charity, or where an immediate gift in favour of charity is followed by an executory gift in favour of private individuals (*r*).

What are charitable bequests.

Those purposes are charitable which the stat. 43 Eliz. c. 4 enumerates or which by analogies are deemed within its spirit and intendment (*s*).

51 & 52 Vict. c. 42, s. 13 (2).

The Mortmain and Charitable Uses Act, 1888, repealed 43 Eliz. c. 4, but s. 13 (2), after reciting the preamble to that Act and that in divers enactments and documents reference is made to charities within the meaning, purview, and interpretation of the said Act, enacts that references to such charities shall be construed as references to charities within the meaning, purview and interpretation of the said preamble.

Four principal divisions.

Charity in its legal sense comprises four principal divisions : trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion,

(*o*) Chamberlayne *v.* Brockett, *ubi sup.*, and see Wallis *v.* Sol.-Gen. for New Zealand, [1903] A. C. 173, 186, per Ld. Macnaghten.

(*p*) Christ's Hospital *v.* Grainger, (1850) 1 Mac. & G. 460.

(*q*) *Re* Tyler, [1891] 3 Ch. 252.

(*r*) *Re* Bowen, [1893] 2 Ch. 491.

(*s*) Morice *v.* Bishop of Durham, (1804) 9 Ves. 399, 405 ; as to what have been held to be charitable objects within the express words or within the spirit of the statute, see Tudor's Charitable Trusts, and Williams (10th ed.) 820 *et seq.*

and trusts for the purposes beneficial to the community not falling under any of the preceding heads (*t*).

Objects of general public utility.

But every object of general public utility is not necessarily a charity (*u*).

Purposes of benevolence or private charity.

Purposes of benevolence or private charity, and many philanthropic purposes, do not come within the technical denomination of charitable purposes (*x*).

Effect of bequest combining charitable and other purposes not charitable.

The law applicable to the case of a bequest made for charitable and other purposes not charitable is thus stated by Lord Davey in *Hunter* v. *Attorney-General* (*y*): "There are two classes of authorities. On the one hand, there is a long series of cases extending from *Morice* v. *Bishop of Durham* (*z*), decided by Sir William Grant and Lord Eldon, to *In re Macduff* (*a*), decided by the Court of Appeal in 1896, and including two decisions of Lord Cottenham. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as 'charitable or benevolent,' or 'charitable or philanthropic,' or 'charitable or pious' purposes), or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty. On the other hand, it has been decided in cases such as *Attorney-General* v. *Doyley* (*b*) and *Salusbury* v. *Denton* (*c*) that where the trustees have a discretion to apportion between charitable objects and

(*t*) Per Ld. Macnaghten in Commissioners of Income Tax *v.* Pemsel, [1891] A. C. 531, 583; and see Theobald on Wills (7th ed.) at p. 351, *et seq.*, where the cases may be found classified with reference to those divisions; see also *Re* Good, [1905] 2 Ch. 60; *Re* Allen, [1905] 2 Ch. 400; *Re* Donald, [1909] 2 Ch. 410.

(*u*) Kendall *v.* Granger, (1842) 5 Beav. 300; and see *Re* Macduff, [1896] 2 Ch. 451; *Re* Sidney, [1908] 1 Ch. 488. Livery companies of the City of London, in the absence of anything special in their charters, are not charities: *Re* Meech's Will, [1910] 1 Ch. 426.

(*x*) James *v.* Allen, (1817) 3 Mer. 17; Ommanney *v.* Butcher, (1823) 1 T. & R. 260; *Re* Macduff, *ubi sup.*; *Re* Sidney, *ubi sup.*

(*y*) [1899] A. C. 309, at p. 323; see also *Re* Davidson, [1909] 1 Ch. 567.

(*z*) (1804) 9 Ves. 399; 10 Ves. 321.

(*a*) *Ubi sup.*, and see Grimond (or Macintyre) *v.* Grimond, [1905] A. C. 124; *Re* Sidney, [1908] 1 Ch. 126.

(*b*) (1735) 4 Vin. Abr. 485, 7 Ves. 58, n.

(*c*) (1857) 3 K. & J. 529.

definite and ascertainable objects non-charitable the trust does not fail; but in default of apportionment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally.

"A third class of cases was relied on by the Attorney-General, of which *Sinnet* v. *Herbert* (*d*) and *In re Douglas, Obert* v. *Barrow* (*e*) are examples, in which there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternate modes of application is invalid in law. In such cases the trust is good, and the Court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable."

Effect of bequest to apply portion of income for definite purpose which fails.

Where there is a gift of money on trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, if the first gift fails, the whole income falls into the surplus, and that whether the extreme sum required for the first purpose can be fairly ascertained or not (*f*). The real question in these cases is whether on the true construction of the gift the trust for the application of income for the first purpose which failed was to be a charge on the whole income, and the residue was to go to the charitable purpose (*g*).

Where general intention is charitable but the particular mode of application fails.

Where there is a gift to charity generally, indicative of a general charitable purpose, and the mode of carrying it into effect is indefinite or fails, the general purpose of charity shall be carried out. If the purpose is indefinite it is for the King by sign manual to deal with the fund, but if there is an object pointed out, the fund will be administered by the Court under the doctrine of *cy-près*. But where the gift is for a particular charitable institution existing at the date of the Will but which has ceased to exist at the testator's death, or where no paramount general charitable intention can be

Where particular charity had ceased to exist at death of testator.

(*d*) (1872) L. R. 7 Ch. 232.
(*e*) (1887) 35 C. D. 472.
(*f*) Williams (10th ed.) 830; Fisk *v.* Att.-Gen., (1867) L. R. 4 Eq. 521; *Re* Rogerson, [1901] 1 Ch. 715.
(*g*) *Re* Rogerson, *ubi sup.*, at p. 718.

inferred and the particular purpose indicated by the testator is impossible to carry out, the gift fails altogether and the ordinary doctrine of lapse applies, and the heir-at-law or residuary devisee or next-of-kin or residuary legatee, as the case may be, becomes entitled to the property (*h*).

A gift to a charitable institution in trust for such other societies as it may deem most in need of help does not indicate a general charitable intent and fails entirely (*i*).

(3) *Gifts for Superstitious Uses.*

What are superstitious uses.

A superstitious use is described to be where lands, tenements, rents, goods, or chattels are given, secured, or appointed for and towards the maintenance of a priest, or other man to pray for the soul of any dead man, in such a church, or elsewhere ; to have or maintain perpetual obits, lamps, torches, etc., to be used at certain times, to help to save the souls of men out of purgatory (*k*).

There is no statute making superstitious uses void generally. The stat. 1 Edw. VI. c. 14 relates only to superstitious uses of a particular description then existing, and does not declare any such gift to be unlawful, but avoids certain superstitious gifts previously created (*l*). That statute, however, has been considered as establishing the illegality of gifts as above described (*m*). It was accordingly held in *West* v. *Shuttleworth* (*n*) that a direction by a testatrix in her Will to pay sums to certain Roman Catholic priests and chapels, desiring that she might have the benefit of their prayers and masses for the repose of her soul and that of her deceased husband, not being intended for the benefit of the priests personally or for the support of the chapels for general purposes, but for the benefit of their prayers for the repose of

Bequest that a person may have benefit of prayers and masses for repose of his soul is void.

(*h*) See *Re* Rymer, [1895] 1 Ch. 19 ; *Re* Davis, [1902] 1 Ch. 876, 888 ; *Re* Wilson, [1913] 1 Ch. 314.

(*i*) *Re* Freeman, [1908] 1 Ch. 720.

(*k*) Bac. Abr. vol. 2, Charitable Uses and Mortmain, Tit. D. p. 37.

(*l*) Cary *v.* Abbot (1802) 7 Ves. 490, 495.

(*m*) Williams (10th ed.) 803.

(*n*) (1835) 2 My. & K. 684 ; see also *Re* Blundell's Trusts, (1861) 30 Beav. 360.

the testatrix's soul and that of her deceased husband, was void. In England in this respect it would seem there is no distinction between a gift for masses for the repose of the testator's soul and a gift for masses generally, and the Roman Catholic Relief Act, 1832 has not altered the law (*o*).

In *Read* v. *Hodgens* (*p*) it was decided that the law, or policy of the law, which in *West* v. *Shuttleworth* was held to underlie the stat. of Edw. VI., did not apply to Ireland, in which there was no analogous statute, and consequently in Ireland a gift for masses is not illegal as a superstitious use.

But bequest for public celebration of masses for repose of a person's soul would seem to be a valid charitable gift.

In *O'Hanlon* v. *Logue* (*q*), where a testatrix by Will declared that the proceeds of sale of her property should be invested and the income paid from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of masses for the repose of the souls of her late husband, her children and herself, which would clearly be void as creating a perpetuity, it was held by the Court of Appeal in Ireland that it was a valid charitable gift, on the ground that it is the performance of an act of the Church of the most solemn kind, which results in benefit to the whole body of the faithful, and is for the advancement of religion, and that the charitable nature of a divine service must (when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question. In this case the Lord Chancellor, Sir Samuel Walker, stated the following three propositions as established: (1) That in speaking of what is "charitable" we use the word in the artificial sense which is derived from the stat. 43 Eliz. c. 4 (Eng.) and 10 Car. I. s. 3, c. 1 (Ir.); (2) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (3) that a gift for the advancement of religion is a charitable gift, and that in applying this principle the Court does not enter into an inquiry as to the truth or soundness of any

No inquiry to be made as to soundness of religious doctrine not contrary to morals or law and intended for public benefit.

(*o*) Heath *v.* Chapman, (1854) 2 Dr. 417.

(*p*) (1844) 7 Ir. Eq. R. 17.

(*q*) [1906] 1 I. R. 247.

religious doctrine, provided it is not contrary to morals and contains nothing contrary to law (*r*).

History of religious toleration.

Formerly a superstitious use was defined to be "one which has for its object the propagation of the rites of a religion not tolerated by the law" (*s*). The persons who differed from the established religion and were formerly held to be obnoxious to the law against superstitious uses were Protestant dissenters, Roman Catholics and Jews.

The Toleration Act, 1689.

The Toleration Act, 1689 (1 Will. & M. c. 18), and certain subsequent statutes exempted the schools and places for religious worship, education, and charitable purposes of Protestant dissenters from the operation of certain penal and disabling laws, and thereupon the Court was bound to administer trusts for the benefit of Protestant dissenting congregations (*t*).

Roman Catholic Relief Act, 1832.

That stat. 2 & 3 Will. IV. c. 115 puts persons professing the Roman Catholic religion upon the same footing with respect to their schools, places for religious worship, education, and charitable purposes in Great Britain, as Protestant dissenters. But nothing in the Act shall be taken to repeal the stat. 10 Geo. IV. c. 7 respecting the suppression or prohibition of the religious orders or societies of the Church of Rome bound by monastic or religious vows (*u*); nor the provisions of 9 Geo. II. c. 36 respecting gifts in mortmain (*x*).

23 & 24 Vict. c. 134, s. 1, provides that no gift or disposition upon any lawful charitable trust for persons professing the Roman Catholic religion shall be invalidated by reason only that the same shall also be subject to any trust or provision deemed to be superstitious or otherwise prohibited by the laws affecting persons professing the same religion, and provides for the apportionment of property so given, so that a proportion may be exclusively subject to the lawful charitable trusts declared by the donor and the residue may become

(*r*) See also per Farwell, J., in *Re* Delany, [1902] 2 Ch. 642, 648; *post*, p. 496.

(*s*) Boyle on the Law of Charities, referred to in Tudor's Charitable Trusts.

(*t*) Att.-Gen. *v.* Pearson, (1817) 3 Mer. 353.

(*u*) See *post*, p. 493.

(*x*) See *infra*.

subject to such lawful charitable trusts to take effect in lieu of such superstitious or prohibited trusts as the Court or judge or charity commissioners may consider just.

Jewish Charities Act, 1846.

By 9 & 10 Vict. c. 59 Jewish charities were put on the same footing as the charities of Protestant dissenters (*y*).

Mode of application when gift fails.

The stat. of 1 Edw. VI. expressly gives to the King such property devoted to superstitious uses as comes within the terms of that Act. But it was held in *West* v. *Shuttleworth* (*z*) that where the object of the gift is charity the duty of appropriating the amount of the legacy to other charitable purposes devolves upon the Crown, but, where the intention is not to benefit the priests, or to support the chapels, but to secure a supposed benefit to the testatrix herself which cannot be carried into effect the next-of-kin are entitled.

(4) *Gifts void under the Mortmain Acts.*

Effect of Mortmain Act, 1888.

The Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), amends and consolidates the former law chiefly contained in the Act 9 Geo. II. c. 36.

Part I., s. 1, of the Act of 1888 provides for the forfeiture to His Majesty of land assured (including by s. 10 assurance by deed, Will or other instrument) to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from His Majesty or of a statute.

Exception of devise by freeman of London of land within the City.

In case of a devise by a freeman of London, of land within the city, the former statute did not apply ; for by the custom of London, freemen may devise in mortmain lands within the city (*a*), and by s. 12 of the Act of 1888 nothing therein shall affect the operation or validity of any charter, licence, or custom in force at the passing of the Act, enabling land to be assured or held in mortmain.

The Act of 1888 rendered all assurances of land to or for the benefit of any charitable uses, and every assurance of

(*y*) See *Re* Michel's Trusts, (1860) 28 Beav. 39.

(*z*) (1835) 2 My. & K. 684.

(*a*) Williams (10th ed.) 816.

personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, void unless made in accordance with the requirements of the Act (*b*).

Act does not extend to Scotland, Ireland, or colonies.

The Act of 1888 does not extend to Scotland or Ireland (s. 11); nor, as it is local, will it extend to prohibit dispositions of real estate, or personal property connected with real estate in the West Indies, or other colonies. But bequests of personal estate connected with real estate in England, to be laid out in land in Scotland, Ireland, etc., for charitable uses, were, prior to the Act of 1891, held void (*c*).

Act extended to all bequests affecting or relating to interests in land.

Under the repealed Mortmain Act, (9 Geo. II. c. 36), as under the Act of 1888, there was no restriction upon any one leaving a sum of money, or any other estate purely personal, to charitable uses, yet not only devises of land, copyhold as well as freehold, and bequests of money to be invested in land, were held void, but also such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged on real estate, or of money to arise from the sale of real estate, even though such real estate was partnership property, or the proceeds of growing crops, bequests of terms for years, or of money due on mortgage, or of money secured on tolls or rates where an interest in land is thereby created, were void (*d*). So a sum of money secured by mortage of both real and personal estate could not be given to a charity, and there could not be any apportionment so as to make a part of the sum available for charity (*e*).

Distinction between bequests to exonerate and in amelioration of land in mortmain.

Although a bequest of money to exonerate lands in mortmain was within the statutes, a bequest of money to be applied simply in the amelioration of lands in mortmain, or for building upon them, or repairing buildings already

(*b*) By Part 3, s. 6 of the Act and by other Acts there are exemptions from the provisions relating to mortmain, which will be found collected in the authorised Chronological Index to the Statutes.

(*c*) Williams (10th ed.) 825.

(*d*) Williams (10th ed.) 808, 809; and see also Williams (10th ed.) 806, 816, as to what sort of property the above Mortmain Acts do or do not apply and the cases there collected.

(*e*) *Re* Watts, (1885) 29 C. D. 947.

erected, was held not within the statutes, the object of which was merely to prevent any addition to the quantity of land already in mortmain (*f*).

Effect of Act of 1891, 54 & 55 Vict. c. 73.

Now, as to testators dying after the 5th August, 1891, the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3, excepts money secured on land or other personal estate arising from or connected with land from the operation of the Act of 1888, and it has been held that the exception covers the case of land devised on trust for sale (*g*).

By sect. 5, "Land may be assured by Will to or for the benefit of any charitable use, but except as hereinafter provided, such land shall, notwithstanding anything in the Will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at chambers or by the charity commissioners."

Where the devise is to trustees upon trust to sell and hand over the proceeds to a charity, the gift to the charity being personal estate arising from land within the exception to s. 3, the trustees are not obliged to sell the land within a year from the testator's death, but may retain it without obtaining the leave of the Court. They are not, however, at liberty to postpone the sale indefinitely (*h*).

By s. 6, after the expiration of the time limited for sale by s. 5, the land unsold, where the exception to s. 3 does not apply, vests forthwith in the official trustee of charity lands, to be sold under order of the charity commissioners.

By s. 7, "Any personal estate by Will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land" (*i*).

(*f*) Williams (10th ed.) 813.

(*g*) *Re* Wilkinson, [1902] 1 Ch. 841; *Re* Sidebottom, [1902] 2 Ch. 389.

(*h*) *Re* Sidebottom, *ubi sup.*

(*i*) See *Re* Sutton, [1901] 2 Ch. 640, as to the meaning of the words "charitable uses."

(5) *Bequests to or for the benefit of Religious Orders.*

Roman Catholic Emancipation Act, 1829.

By 10 Geo. IV. c. 7, ss. 27 *et seq.* (the Catholic Emancipation Act), provision is made for the gradual suppression and final prohibition within the United Kingdom of Jesuits, and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows. Consequently societies of such persons are illegal within the United Kingdom and bequests to them are void.

Act does not extend to religious orders of females

Sect. 37 of the Act provides that nothing therein contained shall extend or be construed to extend in any manner to affect any religious order, community or establishment consisting of females bound by religious or monastic vows.

Sect. 15 of 7 & 8 Vict. c. 97 (authorising endowments for the Roman Catholic clergy and their places of worship) provides that nothing therein shall render lawful any bequest or donation in favour of any religious order prohibited by 10 Geo. IV. c. 7, or in favour of any member or members thereof, and this has been considered as a legislative declaration that a bequest or donation to or for the benefit of the community legislated against by the Catholic Emancipation Act was in 1844 illegal, and if illegal then it is still illegal, notwithstanding penalties under the Act seem never to have been enforced (*k*).

In *Sims* v. *Quinlan* (*l*) a bequest to be applied for the education and maintenance of two priests of the order of St. Dominick in Ireland was held to be wholly void by the operation of the Act of 10 Geo. IV. c. 7, and so also a bequest to a priest upon a secret trust to apply it to the redemption of the rent of a Roman Catholic Church in Cork held by certain Dominican monks as trustees and used as one of the principal places of worship in that city.

In *Cussen* v. *Hynes* (*m*) there were (1) a bequest to the Superior, Rochestown Convent, county Cork, for the education of a priest for that community, and (2) a bequest to the

(*k*) See Cussen *v.* Hynes, [1906] 1 I. R. 539.

(*l*) (1864) 17 Ir. Ch. Rep. 43.

(*m*) [1906] 1 I. R. 539.

Superior, Holy Trinity Church, Charlotte Quay, Cork, for the community. Evidence was given that the convent and the church both belonged to the Franciscan Order, and it was held by the Court of Appeal in Ireland that both bequests were void as within the prohibition created by 10 Geo. IV. c. 7.

Gift for the benefit of the individual is good, but for the benefit of the community is bad.

A gift may be lawfully made to the Superior in his individual capacity, or to any Capuchin priest ; but when it is given to the community of which he happens to be one, and the community is the object to be benefited, it falls within the very words and policy of the Act (*n*). So also in the case of the gift to the Capuchin Church, it is impossible to get rid of the effect of the illegality of the object of the bequest by the character of the work done by it (*o*).

Character of work done does not get rid of illegality.

Effect of gift to illegal community upon a valid trust.

It would seem, however, that a community, illegal as such may be made the recipient of a bequest expressly devoted to a lawful purpose, which the community is bound to carry out—on the principle that a valid and lawful trust is not to be defeated for want of a proper trustee (*p*). But a gift to a monastic order "for teaching purposes" is invalid (*q*).

Effect of gift, non-charitable, to a community of women.

A bequest to a religious community of women may be either a charitable bequest or a non-charitable bequest. The result of the cases would appear to be that a gift not charitable to such a religious community, including not only the existing members, but also all persons who should be, or become thereafter, members of it, during a period capable of extending beyond the legal limits prescribed by the rule against perpetuities, is void ; but that if such gift, according to its true construction, is one to the individuals composing the community at the death of the testator, or some other term within legal limits appointed for ascertaining the class of such individuals, the gift is valid. It was accordingly held

(*n*) Cussen *v.* Hynes, [1906] 1 I. R. 539, per Sir Samuel Walker, C. at p. 543.

(*o*) *Ibid.*, per FitzGibbon, L.J., at p. 547 ; see also Walsh *v.* Walsh, (1869) Ir. R. 4 Eq. 396.

(*p*) Cussen *v.* Hynes, *ubi sup.*, per FitzGibbon, L.J., at p. 545.

(*q*) MacLaughlin *v.* Campbell, [1906] 1 I. R. 588.

in *Morrow* v. *M'Conville* (*r*) by the Vice-Chancellor in Ireland, that a gift to the use and benefit of the Roman Catholic convent of St. Joseph's, Lurgan, was void. For though in the case of a convent there is not a succession recognised by law and necessary for a corporate existence, yet there is a succession in fact, and still in popular estimation it is the same convent, having in many cases endured for centuries, and being like to endure certainly beyond legal limits. In the same case the Vice-Chancellor refused an inquiry as to what the object and purposes of the convent were, as he did not think parol evidence could be properly resorted to for the purpose of converting a trust not charitable upon the face of the Will into a charitable trust.

Parol evidence inadmissible to convert gift non-charitable on the face of Will into charitable trust.

In *Cocks* v. *Manners* (*s*) a bequest to the Dominican convent at Carisbrook (payable to the Superior for the time being), being a religious community living in a state of celibacy, under a common superior, for the purpose of scantifying their own souls by prayer and pious contemplation, was held not to be a charitable trust, nor was it void for perpetuity, since when paid to the superior of the convent it would be subject to no trust which would prevent the existing members of the convent from spending it as they pleased, and was therefore good both as to pure and impure personalty (*t*).

Effect of gift for a convent.

But in the same case a bequest to the Sisters of the Charity of St. Paul at Selly Oak (payable to the Superior thereof for the time being), being a similar community whose primary object was personal sanctification, yet as a means thereto employed themselves in the exercise of works of piety and charity in teaching the poor and nursing the sick, was held to be a charitable bequest, and consequently, as the law then stood, only good as to the pure personalty.

Religious purposes are charitable only when the religious services tend directly or indirectly towards the instruction or

(*r*) (1883) 11 L. R. Ir. 236; and see Stewart *v.* Green, (1871) I. R. 5 Eq. 470.

(*s*) (1871) L. R. 12 Eq. 574.

(*t*) See also *Re* Wilkinson's Trusts, (1887) 19 L. R. Ir. 531.

the edification of the public (*u*). There is no "charity" in attempting to improve one's own mind or save one's own soul. Charity is necessarily altruistic and involves the idea of aid or benefit to others, but given the latter, the motive impelling it is immaterial (*x*).

Gift to a person as holder of an office.

Questions sometimes arise whether persons named as legatees are intended to take a personal benefit, or are designated only as the then holders of office, and the gift to them to depend on their continuance in such office.

A gift to the minister of the Roman Catholic chapel at Kendal was held to be a gift to the minister as such and a charitable bequest (*y*). A gift to the person now minister would have been different. The mere description of the legatee as the holder of an office is not sufficient to raise any such inference (*z*).

A gift to the vicar and churchwardens for the time being of K. to be applied by them in such manner as they shall in their sole discretion think fit is a good charitable gift for ecclesiastical purposes (*a*).

Gift to superior of convent or her successors.

Lord Eldon expressed his opinion that a legacy for such purposes as the superior of the convent or her successor should judge most expedient, being given in that character, was sufficient to show it to be for a superstitious use as the law then stood (*b*).

Gift to A., B. & C., or their successors, known to testator as officials of a religious community.

In *Re Delany* (*c*) the gift was to A., B. & C., Nazareth House, Hammersmith, or their successors. A., B. & C. were members and officials of a religious community, who were living together in a state of celibacy for the purpose of

(*u*) See also *Re* Wilkinson's Trusts, (1887) 19 L. R. Ir. 531; and cf. Dunne *v.* Byrne, [1912] A. C. 407, where the words "conducive to the good of religion" were held not identical with "for religious purposes" and did not constitute a charitable bequest.

(*x*) Per Farwell, J., in *Re* Delany, [1902] 2 Ch. 642, 648, following Cocks *v.* Manners, (1871) L. R. 12 Eq. 574.

(*y*) Thornber *v.* Wilson, (1855) 3 Drew. 245.

(*z*) *Ibid.*; Doe *v.* Aldridge, (1791) 4 T. R. 264; *Re* Delany, *ubi sup.* at p. 647; *Re* Davidson, [1909] 1 Ch. 567.

(*a*) *Re* Garrard, [1907] 1 Ch. 382; but cf. *Re* Friend's Free School, [1909] 2 Ch. 675.

(*b*) Smart *v.* Prujean, (1801) 6 Ves. 560, 567.

(*c*) [1902] 2 Ch. 642.

sanctifying their souls by prayer and pious contemplation, and also with the object of affording permanent homes for aged and infirm persons of both sexes. The persons named were known to the testator to be holders of office in the association. It was held that the bequest was not a gift to the named individuals for their own personal benefit, but to them as holders of office, and for the benefit of the association, which being charitable, and the gift being out of the proceeds of land under the Will of a testator who died in 1886, was void under the Mortmain Act.

Gift to Roman Catholic Archbishop and his successors.

In *Attorney-General* v. *Power* (*d*) it was held that as the law does not recognise any such corporate character as a Roman Catholic archbishop or Roman Catholic bishop a bequest to him and his successors in that character was void. But where the devise was to Cardinal Cullen, and in case of his death to the Roman Catholic Archbishop for the time being of Dublin and to his heirs, etc., absolutely for his and their own use and benefit, the devise was held to be a clear gift for the personal benefit of the devisees (*e*).

(6) *Gifts contra bonos mores or against Public Policy.*

Involving inquiry as to paternity of illegitimate child.

With regard to gifts to future illegitimate children, it would seem such gifts are not void as *contra bonos mores*, if so couched as to avoid any inquiry as to the paternity of the child, but if the identity can only be ascertained by evidence of paternity, it will not be admitted, as being contrary to public decency (*f*).

Against policy of a statute.

Bequests contravening the policy of a statute, for instance, the Mortmain Act, or the stat. 10 Geo. IV. c. 7, are void.

To protect persons against consequences of criminal offences.

So also in *Thrupps* v. *Collet* (*g*), the Court would not give effect to a bequest as charitable which would protect persons from the consequences of their offences against the law, as for purchasing the discharge of poachers committed to prison for

(*d*) (1809) 1 Ball & B. 145.
(*e*) Donnellan *v.* O'Neill, (1870) I. R. 5 Eq. 523.
(*f*) See Williams (10th ed.) 856, and *post*, p. 625.
(*g*) (1858) 26 Beav. 125.

non-payment of fines, fees, or expenses under the Game Laws.

Encouraging doctrine of papal supremacy over sovereignty of the State.

Again, it has been held that a gift is against public policy and void if it is intended to encourage, by the establishment of a charity, the publication of any work which asserts the absolute supremacy of the Pope in ecclesiastical matters over the sovereignty of the State (*h*).

(7) *Invalid Directions for Accumulation of Income.*

Accumulations infringing rule against perpetuities.

Any attempt to sever income from the legal ownership beyond the legal limits allowed by the rule against perpetuities is wholly void, and a trust for accumulation if bad in this respect is wholly bad (*i*). But where the trust for accumulation is for the benefit of the devisees or legatees and the limitations of the property are valid, the trust for accumulation cannot infringe the rule, since there would necessarily be a person who, within the period allowed by law, would have the absolute command over the property and by consequence over the trust (*k*). Thus a trust for accumulation for the purpose of paying the testator's debts is valid, since it does not prevent vesting, and the owner can pay off the charge and put an end to the trust (*l*). But a trust to receive rents and after paying all rates, taxes and outgoings, and the cost of repairs, to pay off all mortgage charges on the estate, and when all the estate should be clear, to sell the same, and divide the proceeds among the testator's children and issue then living, was held to be too remote (*m*).

In *Thellusson* v. *Woodford* (*n*) a direction to accumulate rents and profits and the produce of timber, and to invest in the purchase of real estates, during the lives of the survivor

(*h*) De Themmines *v.* De Bonneval, (1828) 5 Russ. 288.

(*i*) Lord Southampton *v.* Marquis of Hertford, (1813) 2 V. & B. 54; Marshall *v.* Holloway, (1818) 2 Sw. 432, 450; Scarisbrick *v.* Skilmersdale, (1850) 19 L. J. Ch. 126.

(*k*) Miller *v.* Stanley, (1864) 2 De G. J. & S. 183, 192.

(*l*) Marshall *v.* Holloway, *ubi sup.*, at p. 446; Bateman *v.* Hotchkin, (1847) 10 Beav. 426; Briggs *v.* Earl of Oxford, (1852) 21 L. J. Ch. 829; Tewart *v.* Lawson, (1874) L. R. 18 Eq. 490.

(*m*) *Re* Bewick, [1911] 1 Ch. 116; and see *Re* Earl of Stamford and Warrington, [1911] 1 Ch. 255.

(*n*) (1798) 4 Ves. 227; 1 R. R. 357.

of the testator's sons and grandsons, and of such other issue as the sons or grandson might have, as should be living at the death of the testator, or born in due time afterwards, and after the death of the survivor to divide the estates among the descendants of the testator then living, was established as a valid disposition. In order to restrict such accumulations the Thellusson Act, 1800 (39 & 40 Geo. III. c. 98), was passed, and enacts that any direction for the accumulation of income from real or personal property is void, if for any longer period than—

The Thellusson Act, 1800.

(1) The life of the grantor or settlor ;

(2) The term of twenty-one years from the death of the grantor, settlor, or testator ;

(3) During the minority or respective minorities of any person or persons who shall be living, or *en ventre sa mère* at the time of the death of the grantor or testator ;

(4) Or during the minority or respective minorities only of any person or persons who under the uses or trusts would for the time being, if of full age, be entitled to the income.

Any accumulation directed contrary to the provisions of the Act is to go to such person or persons as would have been entitled thereto if such accumulation had not been directed.

Sect. 2 of the Act excepts from its operation—

(a) Any provision for payment of debts of any grantor, settlor, or devisor or other person or persons ;

(b) Any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any conveyance, settlement or devise ;

(c) Any direction touching the produce of timber or wood.

Although the Will contains no express direction to accumulate, yet if an accumulation necessarily takes place by reason of the form in which the property is given the case falls within the Act (*o*).

(*o*) Tench *v.* Cheese, (1855) 6 De G. M. & G. 453.

Excess only bad.

It is only the excess beyond the legal period which is bad ; the trust for accumulation till then is good (*p*).

Four periods alternative.

The four different periods beyond which the accumulation of income is unlawful under the Act are alternative and not cumulative ; therefore when one period has been applied and exhausted, a second period cannot be resorted to and applied, in order to extend the time for accumulation (*q*).

The fourth of the periods is not confined to the minority of persons born in the testator's lifetime (*r*).

Distinction between keeping up and adding to property.

A direction to accumulate for the purpose of keeping up property, and not to add to it, is not within the restriction imposed by the Act (*s*). Therefore a direction by Will to pay out of the testator's property the premiums upon a policy of insurance on the life of another person, is valid for the whole life insured, and is not an accumulation by the Act restricted to 21 years only (*t*). So a trust for applying rents and profits in payment of ground rents and keeping buildings insured against fire and in tenantable repair is good (*u*) ; so also a direction for the purpose of keeping on foot a policy of insurance to secure the replacement at the end of a term of the capital that would be lost through not selling leaseholds (*x*), or providing an indemnity fund to protect trustees from claims for dilapidations which may arise in respect of leaseholds (*y*), or to protect the property of the testator against calls on shares (*z*).

Meaning of "accumulate."

Where there is a direction to invest income *simpliciter* beyond the period of 21 years, there is an accumulation within the meaning of the Thelluson Act, although there is no direction that the income from the investment is to be invested and accumulated, but where the income is to be

(*p*) Oddie *v.* Brown, (1859) 4 De G. & J. 179 ; Green *v.* Gascoyne, (1864) 34 L. J. Ch. 268.

(*q*) Jagger *v.* Jagger, (1883) 25 C. D. 729.

(*r*) *Re* Cattell, [1907] 1 Ch. 567.

(*s*) *Re* Gardiner, [1901] 1 Ch. 697, 00.

(*t*) Bassil *v.* Lister, (1851) 9 Hare, 177 ; and see *Re* Gardiner, *ubi sup.*

(*u*) *Re* Mason, [1891] 3 Ch. 467.

(*x*) *Re* Gardiner, *ubi sup.*

(*y*) *Re* Hurlbatt, [1910] 2 Ch. 553.

(*z*) Varlo *v.* Faden, (1859) 27 Beav. 255.

invested and the income of the investments is to be paid to a tenant for life there is no accumulation within the meaning of the Act (*a*).

Gifts not accelerated by operation of Act.

The application of the Act does not accelerate the enjoyment of any gift or disposition contained in a Will. With regard to the excessive accumulations directed the statute makes an *hiatus* between the period when the accumulation ceases by law and the period when the accumulation is directed to cease, and, if there is nothing in the Will that catches the income which arises during that interval of time, the excessive accumulations are undisposed of (*b*). Such income from residuary estate, if the produce of personal estate, will belong to the next-of-kin (*c*), and if the produce of real estate to the heir-at-law (*d*).

Devolution of excessive accumulations.

Where the invalid direction is to the income of a legacy, and the residuary estate is settled, the accumulations in excess of the lawful period fall into residue as capital (*e*).

Provision for payment of debts.

A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within s. 2 of the Act (*f*).

Meaning of word "portion."

The meaning of the word "portion" as generally understood is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion because it is given to all the children, including the eldest child, and not to younger children generally (*g*).

Act of 1892 as to accumulation for purchase of land.

The Accumulations Act, 1892 (55 & 56 Vict. c. 58), prohibits the accumulation of the income of property for the purchase of land only (*h*), for any longer period than during

(*a*) *Re* Pope, [1901] 1 Ch. 64.

(*b*) Green *v.* Gascoyne, (1864) 34 L. J. Ch. 268.

(*c*) Oddie *v.* Brown, (1859) 4 De G. & J. 179.

(*d*) Nettleton *v.* Stephenson, (1849) 3 De G. & S. 366.

(*e*) Crawley *v.* Crawley, (1835) 7 Sim. 427; Morgan *v.* Morgan, (1851) 4 De G. & S. 164; *Re* Pope, [1901] 1 Ch. 64.

(*f*) *Re* Heathcote, [1904] 1 Ch. 826.

(*g*) *Re* Stephens, [1904] 1 Ch. 322, 327; Colquhoun's Trustees *v.* Colquhoun, [1907] S. C. 346, 352.

(*h*) As to the distinction between a trust to improve land and to pur-

the minority or respective minorities of any person or persons who under the uses or trust of the instrument would for the time being, if of full age, be entitled to receive the income so directed to be accumulated.

Where destination of income and capital is the same Act has no application.

It may here be mentioned that the Court will not enforce a trust for accumulation and postponement of the enjoyment of income of an absolute vested gift where the income follows the destination of the fund from which it is derived, and to such a case the Thellusson Act has no application (*i*).

chase land, see Vine *v.* Raleigh, [1891] 2 Ch. 13; *Re* Gardiner, [1901] 1 Ch. 697, 700.

(*i*) Wharton *v.* Masterman, [1895] A. C. 186; *post*, p. 523.

CHAPTER XXXIV.

OF ADEMPTION AND SATISFACTION.

SECT. 1.—*Of Ademption.*

(1) *Of Specific Legacies.*

Ademption of specific legacy by sale or disposition by testator.

THE general rule is, that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must, at the testator's death, remain in specie as described in the Will, otherwise the legacy is considered as revoked by ademption. For instance, if the legacy be of a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed not only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he should change its form so as to alter the specification of it; as if he should convert the gold chain into a cup, or the wool into cloth, or make a piece of cloth into a garment, the legacy shall be adeemed (*a*).

By change of form so as to alter specification.

Ademption of debt bequeathed by its receipt:

If a debt specifically bequeathed is afterwards received by the testator, the legacy is adeemed because the subject-matter is extinguished (*b*); and the effect is the same although the testator after receiving the amount laid it out on a new security (*c*). So also where a testator in his lifetime received and invested money paid on a policy on his wife's life, which policy he had specifically bequeathed, the legacy was held to be adeemed (*d*). So a specific bequest of stock is adeemed by the sale or payment off of the stock (*e*).

of stock by sale.

(*a*) Williams (10th ed.) 1061.

(*b*) Badrick *v.* Stevens, (1792) 3 Bro. C. C. 431; Manton *v.* Tabois, (1885) 30 C. D. 92, 98.

(*c*) Gardner *v.* Hatton, (1833) 6 Sim. 93; *Re* Bridle, (1879) 4 C. P. D. 336.

(*d*) Barker *v.* Rayner, (1826) 2 Russ. 122.

(*e*) Ashburner *v.* Macguire, (1786) 2 Bro. C. C. 108, 112; Harrison *v.* Jackson, (1877) 7 C. D. 339; *Re* Slater, [1907] 1 Ch. 665.

Partial receipt operates *pro tanto*.

A partial receipt by the testator of the debt or of the stock specifically bequeathed will operate as an ademption *pro tanto* (*f*).

Distinction between gift of money as invested and money however invested.

Cases of construction arise as to whether the gift was of the money as invested, or of the proceeds of the fund however invested provided that it is distinguishable from the rest of the estate. In the latter case there would be no ademption by a change of the investment (*g*).

An alteration in the character of settled property after the date of a Will exercising a power will not prevent the settled property in its altered character from passing (*h*). A testator, whether he has property of his own or whether he has a power of appointment over property, can if he pleases use a form of words which will give effect to his intention, if he so desire it, that that property, or any money or other property into which it may be changed, shall pass at his death to the object of his bounty. In the simple case of a gift or appointment of particular property, describing it as such, no such question can arise (*i*).

Effect of change of character without the knowledge of testator or independently of his intention.

It has been said that no ademption will take place where the thing specifically bequeathed, without the knowledge of the testator, perhaps against his wishes, or tortiously, has been sold, or its character wholly altered by another person (*k*). It would seem that there was a time when the Courts held that ademption was dependent on the testator's presumed intention, and it was accordingly held that when a change was effected by public authority, or without the Will of the testator, ademption did not follow. But that has ceased to be law. It is now law that where a change has occurred in the nature of the property, even though effected by virtue of an Act of Parliament, ademption will follow,

(*f*) Ashburner *v.* Macguire, (1786) 2 Bro. C. C. 108.

(*g*) Morgan *v.* Thomas, (1877) 6 C. D. 176; and cf. Manton *v.* Tabois, *ubi sup.*, and see observations of Farwell, J., in *Re* Dowsett, [1901] 1 Ch. 398, 401; *Re* Moses, [1902] 1 Ch. 100, 123.

(*h*) *Re* Moses, *ubi sup.*

(*i*) *Re* Dowsett, *ubi sup.*, at p. 401.

(*k*) Jenkins *v.* Jones, (1866) L. R. 2 Eq. 323, 328; and see Williams (10th ed.) 1066.

unless the testator has at the time of his death substantially the same thing existing, changed only in name or form (*l*).

Pledging chattels.

As to specific legacies of goods where the disposition of the subject is not absolute, the legacy will not be adeemed : As where a testator pawns or pledges an article specifically bequeathed, a right of redemption is left in him, and passes to the legatee at his death, so as to enable him to call on the executor to redeem, and deliver it to him (*m*).

Removal of goods where locality is part of description.

The ademption of a specific legacy of goods will sometimes be effected by the mere removal of them ; as where the testator bequeathed all his books at his chambers in the Temple, and afterwards removed his books into the country (*n*) ; or bequeathed all his goods in a house and subsequently removed them : the general rule being that such description relates to the death of the testator, and if removed they would not pass (*o*). But a mere temporary removal for preservation, as on account of fire, or during a temporary occupancy of a house, would not be an ademption (*p*) ; nor where it is clear that their locality was not referred to as essential to the bequest (*q*).

Surrender on grant of new lease.

A specific bequest of a term of years may be confined to the existing term, in which case the gift would be adeemed by the subsequent surrender of the term, notwithstanding the grant of a new lease (*r*). But the context may show that the testator did not intend to confine its operation to the interest which he had at the date of the Will, and in that case even the subsequently acquired freehold may pass (*s*).

Ademption applies to appointments under powers.

The rule as to ademption applies to appointments under powers. The power must be read with the instrument creating it, and if at the date when the instrument comes into

(*l*) *Re* Slater, [1907] 1 Ch. 665, 671 ; and see *Re* Clifford, [1912] 1 Ch. 291 ; *Re* Leeming, [1912] 1 Ch. 828 (reconstruction of company).

(*m*) Williams (10th ed.) 1067.

(*n*) Green *v.* Symonds, (1730) 1 Bro. C. C. 128, n.

(*o*) Chapman *v.* Hart, (1749) 1 Ves. Sen. 271, 273.

(*p*) *Ibid.* ; Rawlinson *v.* Rawlinson, (1876) 3 C. D. 302.

(*q*) See Williams (10th ed.) 1068.

(*r*) Slatter *v.* Noton, (1809) 16 Ves. 197 ; and see Williams (10th ed.) 1069.

(*s*) Saxton *v.* Saxton, (1879) 13 C. D. 359.

operation either there is no person to take, or there is no property on which the power can operate, the appointment fails. There is no distinction to be drawn between general and specific powers in this respect (*t*).

(2) *Ademption by Payment in Anticipation.*

(*a*) *By Testator in loco parentis.*

Subsequent gift *inter vivos* by testator *in loco parentis.*

When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts of a material kind) there is a presumption *primâ facie* that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee ; and consequently that the gift *inter vivos* is either wholly or in part a substitution for, or " an ademption " of, the legacy (*u*).

Principle founded on presumption of equality.

The principle is that it must be presumed that a father intends equality between the children ; and if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is that such advance must be brought into hotchpot, so that the disposition of his fortune, by which he intended to produce equality among the children, may not be altered (*x*).

Special power by Will or deed.

The rule against double portions is applicable to appointments made by a parent in exercise of a special power, so that an appointment by Will may be adeemed by a subsequent appointment by deed (*y*).

The doctrine not applied in favour of a stranger.

The rule designed to produce equality among children cannot be extended so as to reduce their shares for the benefit of a stranger. The doctrine can only be applied between children, against a child in favour of a child, not in favour of a stranger (*z*).

(*t*) *Re* Dowsett, [1901] 1 Ch. 398 ; *Re* Moses, [1902] 1 Ch. 100.

(*u*) *Re* Pollock, (1885) 28 C. D. 552, 555, per Ld. Selborne.

(*x*) Meinertzagen *v.* Walters, (1872) L. R. 7 Ch. 670, 673, per James, L.J.

(*y*) *Re* Peel's Settlement, [1911] 2 Ch. 165.

(*z*) Meinertzagen *v.* Walters, *ubi sup.* ; *Re* Heather, [1906] 2 Ch. 230.

Such ademption only *pro tanto.*

It was at one time thought that the ademption in such a case would be (*primâ facie*) total, although the amount of the subsequent advancement might be less than that of the legacy, but in *Pym* v. *Lockyer* (*a*) the rule was established that when the donor is a parent, or *in loco parentis*, and when the amount of the subsequent gift is less than that of the legacy, the mere presumption does not go beyond an ademption *pro tanto* (*b*).

No distinction between bequest of specific amount and of a residue in application of the principle;

The case of *Pym* v. *Lockyer* having established that there may be ademption *pro tanto*, it followed that there was no reasonable distinction between a bequest of a specific amount and the bequest of a residue, and it was accordingly decided in *Montefiore* v. *Guedalla* (*c*) that a bequest of a share of residue for the benefit of a child is subject to ademption in the same way as a pecuniary legacy. Satisfaction by a residue and ademption of a residue for this purpose cannot be distinguished.

nor between gifts of money and of other kind of property.

There would seem to be no principle on which a distinction can be drawn for the purpose of considering what is a portion between a gift of money and a gift of any other kind of property, and the cases show that gifts of shares of residue, of shares in partnership property, and of real estate have been considered and treated as portions; it is a question of intention (*d*).

Whether gift was intended as ademption depends on all the circumstances

In considering whether an advance is to be considered as a portion and an ademption of a portion under a Will, the whole of the circumstances and manner of the gift must be looked at (*e*). If a child were in business and required further capital, a sum given for that purpose would be an advancement, but a sum given merely to assist him temporarily would not. So in *Taylor* v. *Taylor* (*f*) a father who had paid a sum of £650 to extricate his son from debts of honour in

(*a*) (1841) 5 My. & Cr. 29.

(*b*) Per Ld. Selborne in *Re* Pollock, *ubi sup.*

(*c*) (1860) 1 De G. F. & J. 93, 100

(*d*) *Re* Lacon, [1891] 2 Ch. 482, 487, per Romer, J. (C. A.) 492; and see *Re* Jaques, [1903] 1 Ch. 267.

(*e*) Ravenscroft *v.* Jones, (1864) 4 De G. J. & S. 224, 228, per Knight Bruce, L.J.

(*f*) (1875) L. R. 20 Eq. 155.

India was treated by Jessel, M.R., as having thus made a gift to his son, and not an advancement by way of portion ; and so it was held in *Re Scott* (*g*) with regard to payment of £1,500 to a son to release him *pro tanto* from a debt which might have been enforced against him by mortgagees if the father had not come forward with his assistance.

Purchase in name of son.

The purchase of property by a father in the name of his son is a presumptive advancement, and the subsequent perception of profits or making of leases by the father will not convert a presumptive advancement into a trust for the father (*h*).

Parol evidence admissible.

Parol evidence is admissible in such cases for the purpose of showing what the testator meant by the act subsequent to the Will. The parol evidence is not receivable as evidence of revocation or alteration of any part of the Will, but as evidence of a transaction whereby the legatee has received the legacy, or part of the legacy, by anticipation (*i*).

Parol evidence admissible both to rebut and support presumption.

If the presumption of law against double portions, provided by a person *in loco parentis*, be attempted to be rebutted by parol evidence, it may be supported by evidence of the same kind ; and the declarations of the person *in loco parentis* are admissible in evidence upon the question of his intention (*k*).

Subsequent codicil confirming Will not conclusive.

The existence of a codicil executed after the advancement and expressly confirming the Will giving a legacy, but containing no reference to it, is a fact which cannot be left out of consideration, but is not decisive of the question (*l*).

Both gifts must be in nature of portions.

In order to establish a case for the application of the rule as to double portions both of the suggested gifts or portions must be gifts in the nature of a portion (*m*).

Effect of differences in the limitation of gifts.

The application of the principle of ademption will not be

(*g*) [1903] 1 Ch. 1, approving Taylor *v.* Taylor, *ubi sup.*

(*h*) Grey *v.* Grey, (1677) 2 Swanst. 594 ; Com. of Stamp Duties *v.* Byrnes, [1911] A. C. 386.

(*i*) Kirk *v.* Eddowes, (1844) 3 Hare, 509 ; *Re* Shields, [1912] 1 Ch. 591 ; and see Williams (10th ed.) 1074.

(*k*) Powys *v.* Mansfield, (1837) 3 My. & Cr. 359.

(*l*) Ravenscroft *v.* Jones, *ubi sup.* ; *Re* Scott, *ubi sup.*

(*m*) *Re* Lacon, [1891] 2 Ch. 482, 498, per Bowen, L.J.

prevented by the circumstance that the limitations of the portion under the Will are widely different from the limitations of the portion under the settlement (*n*). Accordingly, where a father makes an absolute gift by Will of a certain sum to a daughter and afterwards takes upon himself to make a settlement upon her marriage of a like sum on her and her husband and children, the variance between the provisions of the Will and those of the settlement affords no argument against the portion being a satisfaction of the legacy, and the provision by the settlement is an ademption of the legacy (*o*). And so where a legacy is given to M., with a contingent limitation over to N. in the event of M. dying without children, if the legacy to M. is adeemed by a subsequent gift to M. in the lifetime of the testator, to which no limitation in favour of N. is attached, the legacy is not merely adeemed as to M., but also extinguished as to N. (*p*).

What constitutes standing *in loco parentis*.

Mothers, uncles, great-uncles, grandfathers or grandmothers, or putative fathers, are not to be considered *in loco parentum* unless they have intended to assume the office and duty of a parent. But a person may stand *in loco parentis* to a child, though the child resides with and is maintained by his father (*q*). Parol evidence is admissible to prove that a person meant to put himself *in loco parentis* to a child, so far as relates to the child's future provision ; and evidence of his declarations, as well as the acts of such a person, are admissible for that purpose (*r*).

Liability for estate duty.

If in consequence of an advance made by a testator in his lifetime to one of his children, the child's share in the testator's residuary estate being adeemed *pro tanto*, it becomes necessary to bring the amount of the advance into account, and estate duty has to be paid under s. 2 (1) (c) of the Finance Act, 1894, by reason of the death of the testator within one year of the gift, the amount for which the child is accountable

(*n*) Durham *v.* Wharton, (1835) 3 Cl. & F. 146, 154.

(*o*) Barry *v.* Harding, (1844) 1 J. & L. 475, 482.

(*p*) Twining *v.* Powell, (1845) 2 Coll. 262.

(*q*) Williams (10th ed.) 1077.

(*r*) Powys *v.* Mansfield, *ubi sup.*

is the sum advanced less the amount payable for estate duty (*s*); and where the ademption is in respect of a sum covenanted to be paid to trustees after the death of the testator the estate duty is payable out of the testator's estate as the trustees are simply creditors (*t*).

(*b*) *Of Legacies bequeathed for a Particular Purpose.*

Effect of subsequent gift to stranger for same purpose as legacy.

If a legacy appears on the face of the Will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a presumption is raised in favour of ademption. Evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not), may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine it is not necessary that some special use or application of the money, by or on behalf of the legatee (*e.g.*, for binding him an apprentice, purchasing for him a house, advancing him upon marriage, or the like), should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised, or would have presumed to exist. A case of this kind comes very near in principle to the first class of cases in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation or duty, a double fulfilment was (presumably) not intended (*u*).

(*s*) *Re* Beddington, [1900] 1 Ch. 771.

(*t*) See *ante*, p. 191.

(*u*) *Re* Pollock, (1885) 28 C. D. 552, 556, per Ld. Selborne.

Legacy given to satisfy debt subsequently discharged in testator's lifetime.

Although no particular purpose is referred to in the Will, yet it may be shown that the legacy was given for a purpose, as for payment or satisfaction of a debt, and if the debt is paid off in the testator's lifetime his estate is relieved from payment of the legacy (*x*).

Payment in anticipation of legacy.

So it may be shown that a legacy given by Will of a sum of money by a mother, or person not *in loco parentis*, is adeemed by payment or appointment by the testatrix in her lifetime of a sum of money to the legatee in anticipation (*y*).

What is a particular purpose.

There would seem to be no authority that a mere legacy to A. in trust for the benefit of B., an infant, is a legacy for a particular purpose within the rule, and it was accordingly held in *Re Smythies* (*z*) that a legacy to a trustee for the benefit of an infant, to whom the testator is not *in loco parentis*, is not given for a particular purpose so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose.

A legacy to the trustees of the endowment fund of a hospital, not for the general purposes of the hospital, is a legacy for a particular purpose, and is therefore adeemed by a gift of the same amount to the same trustees in the testator's lifetime (*a*).

Sect. 2.—*Of Satisfaction of Debts and Portions.*

(1) *Satisfaction of Debts by Legacies.*

Bequest by the debtor of legacy equal to or exceeding debt presumed to be in satisfaction.

Where a debtor bequeaths to his creditor a legacy equal to or exceeding the amount of his debt, it will be presumed, in the absence of evidence of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt (*b*).

Judges, however, have frequently expressed their disapproval of this rule, and the Courts have laid hold of slight circumstances to get out of it (*c*).

(*x*) *Re* Fletcher, (1887) 38 C. D. 373.
(*y*) *Re* Ashton, [1898] 1 Ch. 142.
(*z*) [1903] 1 Ch. 261.
(*a*) *Re* Corbett, [1903] 2 Ch. 326.
(*b*) Williams (10th ed.) 1041; *Re* Rattenberry, [1906] 1 Ch. 667, 670.
(*c*) *Re* Horlock, [1895] 1 Ch. 516, 518.

What is sufficient to rebut presumption.

The presumption is rebutted if the debt was contracted after the date of the Will, or if the debt is due on a current account, or upon a bill of exchange or other negotiable instrument ; or if the legacy is contingent, or uncertain as to amount, as if it is the whole or part of a residue, or if the legacy is merely a life interest, or being an absolute legacy payment is deferred (*d*).

Neither the fact that the legacy is not payable under the ordinary law until one year after the death of the testator, nor the appointment of the legatee as executor, takes the case out of the general rule (*e*). But a legacy as to which no time was fixed for payment has been held not to be a satisfaction of a debt payable within three months of the testator's death, owing to the difference in the times at which the legatee was entitled to call for payment (*f*).

A direction by a testator that his debts are to be paid is sufficient, without the further direction to pay legacies, to exclude the presumption that a legacy to a creditor equal to or exceeding the debt is a satisfaction of the debt (*g*).

A further exception may be found in cases where the legacy and debt are of a different nature ; as where the testator is indebted by bond, and bequeaths an interest in land to his creditor (*h*) ; or where the legacy is of chattels (*i*) ; or where the testator had money in his hands as trustee for a person for life and then for children, and made a gift of like amount to the tenant for life absolutely (*k*).

Rule applies to legacy by parent to child or by husband to wife.

A legacy by parent to child, or by husband to wife, is subject to the same general rule as to the legacy being meant as a satisfaction of a debt (*l*).

Parol evidence admissible.

Parol evidence is admissible to show whether or not the testator intended the legacy to be in addition to the debt (*m*).

(*d*) Williams (10th ed.) 1042 ; Crichton *v.* Crichton, [1895] 2 Ch. 853.
(*e*) *Re* Rattenberry, *ubi sup.*
(*f*) *Re* Horlock, *ubi sup.*
(*g*) *Re* Huish, (1889) 43 C. D. 260.
(*h*) Williams (10th ed.) 1043.
(*i*) Byde *v.* Byde, (1761) 1 Cox, 44, 49.
(*k*) Fairer *v.* Park, (1876) 3 C. D. 309.
(*l*) Williams (10th ed.) 1045.
(*m*) *Re* Horlock, *ubi sup.*

(2) *Satisfaction of Portions by Legacies.*

Presumption against double portions.

Equity leans against double portions, and the general rule is that wherever a legacy given by a parent, or a person standing *in loco parentis*, is as great as or greater than a portion previously secured to the legatee upon marriage or otherwise, a presumption arises that the legacy was intended as a satisfaction of the portion. If the legacy is less than the portion, a presumption arises that it was intended as a satisfaction *pro tanto* (*n*).

A share of residue is on the same footing as a pecuniary legacy as regards the rule against double portions (*o*).

Election by one of several *cestuis que trust.*

Where there is a covenant with trustees to pay a sum to them to be held in trust for persons in succession, a legacy given to one or more of the *cestuis que trust* may operate as a satisfaction of the covenant so far as the legatees are concerned, without satisfying the covenant so far as the other *cestuis que trust* are concerned, who are not legatees. The election of one of the *cestuis que trust* to take under the Will cannot affect the rights of the other covenantees who take no interest under the Will (*p*).

Presumption founded on intention.

The question whether a gift in a Will is a satisfaction of a portion given in a settlement, or a portion in a settlement is an ademption of a gift in a Will, is one of intention. The rule that there is a presumption against double portions is founded on the presumption that the maker of the second instrument supposed himself to be substantially satisfying the obligations of the first. This rule is much easier of application where the Will precedes the settlement than where the settlement precedes the Will. In the latter case, the intention to satisfy a covenant must be distinctly expressed or clearly indicated. Great differences in the sums given, and in the limitations of the trusts on which they are given, will be taken as indications that the gift in the Will

(*n*) *Re* Blundell, [1906] 2 Ch. 222, 226; and see Williams (10th ed.) 1045.

(*o*) Thynne *v.* Earl of Glengall, (1848) 2 H. L. Cas. 131.

(*p*) *Re* Blundell, *ubi sup.*

was not meant in satisfaction of the covenant. Where, too, the gift by the Will is not to the child, but to trustees to pay debts and legacies and then to pay the residue to the child, the form of the gift will be taken as an indication that the debt due under the settlement must be satisfied before the residue is declared (*q*). No positive rule has been or can be laid down as to what is sufficient to rebut the *primâ facie* presumption against double portions (*r*).

Parol evidence admissible to rebut presumption.

Parol evidence of intention is admissible to rebut the presumption against double portions, since parol evidence is always admissible to rebut, but not to raise, a presumption (*s*).

(3) *Satisfaction or Performance of Covenant out of distributive Share on Intestacy.*

If a person covenants to do an act, and he does that which may either wholly or partially be converted to or towards completion of the covenant, he is presumed to have done it with that intention (*t*).

For instance, if a person covenants to purchase and settle lands of a certain value on his son, and he purchases land but dies without making any settlement thereof, and the lands descend upon the son, they are deemed to be a satisfaction of the covenant (*u*), or if of less value, they are considered as bought in part performance of the covenant (*x*).

The same principle applies where the covenant is to pay to trustees to be laid out by them in the purchase of land, and the covenantor having purchased land dies intestate without having performed his covenant (*y*).

(*q*) Chichester *v.* Coventry, (1867) L. R. 2 H. L. 71.

(*r*) *Ibid.*; and see Montagu *v.* Earl of Sandwich, (1885) 32 C. D. 525; Cartwright *v.* Cartwright, [1903] 2 Ch. 306.

(*s*) *Re* Tussaud's Estate, (1878) 9 C. D. 363.

(*t*) Per Sir Lloyd Kenyon in Sowden *v.* Sowden, (1785) 1 Cox, 165; and see White and Tudor's Leading Cases.

(*u*) Wilcocks *v.* Wilcocks, (1706) 2 Vern. 558.

(*x*) Lechmere *v.* Earl of Carlisle, (1735) 3 P. Wms. 227.

(*y*) Sowden *v.* Sowden, *ubi sup.*

So also if a person covenants to leave, or that his executors shall pay, to another, a sum of money, or part of his personal estate, and dies intestate, and the covenantee becomes entitled to a portion of the covenantor's personal property, of equal or greater value under the Statutes of Distribution, such distributive share will be taken to be performance (*z*), or if of less value, part performance of the covenant (*a*), and the same principle applies where the covenant is to pay to trustees (*b*).

But the principle will not apply where the covenant is, not to pay a gross sum, but the interest of a sum of money for life, or a mere life annuity (*c*) ; nor will it apply where the covenant is to pay a sum in the covenantor's lifetime (*d*).

(4) *Satisfaction or Performance of Covenant by Gift inter vivos.*

A similar principle of presumed intention of performance arises in the case of a gift by deed executed subsequently to the covenant, although it less readily arises (*e*).

But satisfaction or part performance on the ground of the leaning against double portions can only arise where both portions issue from one and the same person (*f*). No presumption of satisfaction or performance arises where the property subsequently given is not the property of the person liable under the covenant. For instance, property subject to a special power of appointment is not the property of the donee of the power, and the exercise of the power by the donee will not operate either as satisfaction or as part performance of the donee's covenant (*g*).

(*z*) Blandy *v.* Widmore, (1716) 1 P. Wms. 323 ; and see White and Tudor's Leading Cases.

(*a*) Garthshore *v.* Chalie, (1804) 10 Ves. 1.

(*b*) Lee *v.* D'Aranda, (1746) 3 Atk. 419 ; Sowden *v.* Sowden, *ubi sup.*

(*c*) Couch *v.* Stratton, (1799) 4 Ves. 391 ; and see Lemon *v.* Mark, (1899) 1 Ir. 416.

(*d*) Oliver *v.* Brighouse, (1732), cited in 1 Ves. 1 ; and see *post*, p. 594.

(*e*) Palmer *v.* Newell, (1855) 20 Beav. 32, 40, and on appeal 8 De G. M. & G. 74.

(*f*) See Farwell on Powers (2nd ed.) p. 396.

(*g*) Bannatyne *v.* Ferguson, (1896) 1 Ir. 149, 167, 178.

Sect. 3.—*Of Release of Debts by Legacies.*

Bequest by creditor of legacy to debtor no release of debt in absence of intention.

Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt, if any exist, are found uncancelled among the testator's property, the Courts of Equity do not consider the legacy to the debtor as necessarily, or even *primâ facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release :

Parol evidence of intention admissible.

And if such intention does not appear clearly expressed or implied on the face of the Will, evidence from other sources will be admitted (*h*).

Sect. 4.—*Of Satisfaction of Debts out of Legacies.*

Principle that legatee cannot receive any bounty under Will until debt owing by him to the estate is satisfied.

A legatee is not entitled to receive, out of the estate of his testator, any part of the bounty intended for him by the testator, until the legatee has paid all his own obligations in the shape of debts owing to the testator's estate (*i*).

The principle would seem to be that a person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing is in truth retained by the representative of the estate : nothing is in strict language set off ; but the contributor is paid by holding in his hand a part of the mass, which, if the mass were completed, he would receive back (*k*). This rule is of much wider application than the doctrine of set-off (*l*). There must, however, be an existing legal liability on the legatee (*m*). The principle cannot apply to specific

Principle does not apply to specific

(*h*) Williams (10th ed.) 1048.

(*i*) Lindley on Partnership (7th ed.) 682 ; Williams (10th ed.) 1049.

(*k*) *Re* Akerman, [1891] 3 Ch. 212, 219 ; and see per Ld. Selborne, L.C., in *Re* Batchelor, (1873) L. R. 16 Eq. 481, 483.

(*l*) *Re* Rhodesia Goldfields, Ltd., [1910] 1 Ch. 239.

(*m*) *Re* Bruce, [1908] 1 Ch. 850 ; 2 Ch. 682 ; *Re* Sewell, [1909] 1 Ch. 806 ; and see *post*, p. 603.

devisees, or legatees of chattels real, or of a specific chattel (*n*). But the principle will be applied in the case of a specific legatee, if the legacy be represented by money in the hands of the executor (*o*). Moreover, the principle does not apply where the debt is owed by a partnership of which the legatee is a member (*p*).

devisees, or to specific legatees unless legacy represented by money in hands of executor.

A legacy or share immediately payable cannot be retained to meet a debt payable at a future time (*q*).

An assignee is in no better position than the debtor, and the principle applies not only to shares taken by the debtor under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate (*r*).

Position of assignee.

The principle does not apply to the case of a legatee who became bankrupt before the death of the testator (*s*) ; but it will apply if the debtor became bankrupt after the death of the testator (*t*), unless the executors have proved in the bankruptcy, or are bound by a composition deed to which the statutory majority of the creditors have assented, in which case the principle would apply only to the dividend, or amount of the composition (*u*). The effect of the proof in bankruptcy is to discharge the debt and entitle the bankrupt to his legacy, if the bankruptcy has been annulled, even though the proof was put in by a receiver without obtaining leave from the Court (*x*).

Effect of bankruptcy of legatee.

Sect. 5.—*Of the Effect of Appointing Debtor to be Executor.*

At law an appointment by the testator of his debtor, whether he was a sole debtor or one of several joint debtors,

Appointment of executor being a voluntary act released debt at law.

(*n*) Fox *v.* Buckley, (1876) 3 C. D. 508 ; *Re* Akerman, *ubi sup.*

(*o*) *Re* Taylor, [1894] 1 Ch. 671.

(*p*) Turner *v.* Turner, [1911] 1 Ch. 716.

(*q*) *Re* Akerman, *ubi sup.* ; *Re* Abrahams, [1908] 2 Ch. 69.

(*r*) Doering *v.* Doering, (1889) 42 C. D. 203 ; and see *post*, p. 604.

(*s*) Cherry *v.* Boultbee, (1839) 4 My. & C. 442 ; *Re* Hodgson, (1878) 9 C. D. 673 ; but see *Re* Pink, [1912] 1 Ch. 498, 505, that those accountable for the legacy can retain thereout the dividends distributable in the administration of the bankrupt legatee's estate.

(*t*) *Re* Watson, [1896] 1 Ch. 925.

(*u*) *Ibid.*, at p. 933 ; *Re* Orpen, (1880) 16 C. D. 202.

(*x*) Armstrong *v.* Armstrong, (1871) L. R. 12 Eq. 614 ; and see *Re* Sewell, *ubi sup.*

or even one of joint and several debtors, his executor, operated as a release or extinguishment of the debt; the principle being that a debt is merely a right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment by the creditor to that office suspended the action for the debt: and where a personal action is once suspended by the voluntary act of the party entitled to it, it is for ever gone and discharged (*y*). But this doctrine did not apply so as to defraud creditors of their just debts, and therefore the debt due from the executor was considered, on their behalf, as assets in his hands. And in the case of administration granted to the debtor, the remedy being suspended by act of law and not by the voluntary act of the creditor, it was held to be only temporarily suspended and might be enforced by an administrator *de bonis non* (*z*).

Grant of administration, being act of law, suspends only the remedy.

In equity debt general assets for legatees as well as creditors:

However, in equity the debt is general assets, not only for the payment of the testator's debts, but also of his legacies; and there is also a trust for the residuary legatee, or next-of-kin, as the case may be (*a*).

unless contrary intention proved.

But in equity, if the rights of creditors are not interfered with, evidence is admissible to show an intention of the testator to forgive the debt, and then the operation of the appointment of his debtor as executor would complete his title and release the debt (*b*), although he may never prove the Will (*c*). An incomplete transaction does not amount to a gift of the debt, nor to an equitable release of it; mere

(*y*) Williams (10th ed.) 1054.

(*z*) *Ibid.*

(*a*) *Ibid.*, 1057.

(*b*) *Re* Applebee, [1891] 3 Ch. 422; *Re* Griffin, [1899] 1 Ch. 408; *Re* Pink, [1912] 2 Ch. 528.

(*c*) *Re* Applebee, *ubi sup.* So also an imperfect gift *inter vivos* may be perfected by the donor appointing the donee executor: Strong *v.* Bird, (1874) L. R. 18 Eq. 315; *Re* Stewart, [1908] 2 Ch. 251; and see *ante*, p. 334. The principle is not confined to the release of a debt, but applies to any incomplete gift where the intention of the testator remained unchanged, and it is immaterial whether the donee is the only executor or one of several. But the rule laid down in Strong *v.* Bird and extended by *Re* Stewart, ought not to be further extended so as to be applicable to a mere promise to pay an indefinite sum at a future time: *Re* Innes, [1910] 1 Ch. 188.

voluntary declarations indicating intention if not evidence of a release at law do not constitute a release in equity (*d*).

SECT. 6.—*Of the Effect of appointing Creditor to be Executor.*

Debt only extinguished on principle of retainer.

If the debtor makes his creditor, or the executor of his creditor, his executor, this alone is not an extinguishment of the debt, but if the executor has assets which he may retain to pay himself, it is an extinguishment, for the having assets amounts to payment (*e*).

(*d*) Cross *v.* Sprigg, (1849) 6 Hare, 552. At law exoneration before breach need not be under seal; but a release must be under seal except in the cases provided by s. 62 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), or in cases of agreements for valuable consideration: Edwards *v.* Walters, [1896] 2 Ch. 157, 168.

(*e*) Wankford *v.* Wankford, (1698) 1 Salk. 299, 305.

CHAPTER XXXV.

OF VESTED, CONTINGENT, AND CONDITIONAL LEGACIES.

SECT. 1.—*Of Legacies whether Vested or Contingent.*

Future time for payment expressed.

WHEN a future time for the payment of a legacy is defined by the Will, the legacy will be vested or contingent, according as, upon construing the Will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it (*a*).

Gift payable at a determinate future time confers immediate vested interest.

In ascertaining the intention of the testator in this respect Courts of Equity have established two positive rules of construction; 1st. That a bequest to a person payable or to be paid at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in præsenti solvendum in futuro*, and transmissible to his executors or administrators; for the words "payable" or "to be paid" are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly, and contained no mention of time.

But words such as "at 21," or "if," "when," or "in case," or "provided," the legatee attains 21 or other future period make gift contingent.

2nd. That if the words "payable" or "to be paid" are omitted, and the legacies are given "at twenty-one," or "if," "when," "in case," or "provided," the legatees attain twenty-one, or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Consequently, if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy (*b*).

(*a*) Williams (10th ed.) 971.

(*b*) See Williams (10th ed.) 971 *et seq.*, where the above rules are stated and illustrated by decided cases, and

Effect of giving interim interest.

In the case of a particular legacy, where interim interest is given, it is presumed that the testator meant an immediate gift, because for the purpose of interest the legacy is to be immediately separated from the bulk of the property (*c*). And where there is a gift by Will of a share of residue, to be paid or transferred to the legatee on his attaining a particular age, with a direction that in the meantime the income of the share shall be applied for his maintenance, the share is vested and not contingent (*d*). But where a testator gives residue to several persons on their attaining twenty-one in equal shares, and directs the income of the whole fund during their respective minorities to be applied for the maintenance of all indiscriminately, the gift will not be vested (*e*). There would seem to be no absolute rule of construction arising on a direction to apply the whole income for maintenance "at the discretion of trustees or otherwise," but in each case the whole frame of the Will must be looked at to ascertain whether the gift is of the interest for maintenance or a gift of maintenance out of interest (*f*).

Effect of direction to pay and transfer at a future time without any direct gift.

The use of such words as "pay and transfer" as the only words of gift in a deferred bequest, does not make such bequest contingent. The true criterion is, what was the reason for the postponement? If it was the position of the fund, as in a gift to one for life, and after his death to others, the bequest in remainder vests at once; but if it was the position of the legatee, as where the gift is by a direction to pay the fund to the legatee when he shall attain twenty-one, it is contingent (*g*).

Gift over as indicating vested interest subject to be divested.

A devise of real estate to a devisee "when she shall attain the age of twenty-five years" without more is contingent on

also cases showing how the intention will be controlled by the context; see also *Re* Couturier, [1907] 1 Ch. 470, 472 (where the principles are stated by Joyce, J.); *Re* Lord Nunburnholme, [1912] 1 Ch. 489.

(*c*) Vawdry *v.* Geddes, (1830) 1 Russ. & My. 203, 208.

(*d*) *Re* Gossling, [1903] 1 Ch. 448.

(*e*) *Re* Parker, (1880) 16 C. D. 44; and see *Re* Gossling, [1902] 1 Ch. 945, reversed on appeal on point of construction.

(*f*) See Williams (10th ed.) 984, n. (*u*); and see *Re* Williams, [1907] 1 Ch. 180.

(*g*) *Re* Bennett's Trust, (1857) 3 K. & J. 280.

her attaining that age (*h*). But if there is a gift over on the devisee dying under age it would seem that is sufficient to show the testator intended the devisee to take a vested interest subject to be divested on a future contingency (*i*).

Legacy "as soon as," etc., with interest contingent both as to principal and interest.

A legacy to A., as soon as he attains the age of twenty-one years, with interest, is contingent, as well as regards the interest as the principal, and there is no gift either of principal or interest until the legatee attains twenty-one (*k*).

Effect of direction to accumulate following absolute vested gift.

Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation in which no person has any interest but the legatee ; in other words the Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit (*l*).

Effect of gift absolute followed by qualifying trusts which fail.

Where there is an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin as the case may be (*m*).

But if there is an absolute gift, and then a clause (whether in a subsequent part of the Will or by codicil), not merely modifying the enjoyment by the legatee, but diminishing the estate originally given to him, then the absolute gift has in effect been cut down, and the Court can only give effect to it so diminished (*n*).

Where the words of gift are sufficient to give the legatee or devisee the whole property in the subject-matter, the interest of the legatee or devisee will not be cut down to a trust estate, or to a life estate with a trust for disposal after-

(*h*) *Re* Francis, [1905] 2 Ch. 295.

(*i*) Phipps *v.* Ackers, (1842) 9 Cl. & F. 583.

(*k*) Knight *v.* Knight, (1826) 2 Sim. & St. 490.

(*l*) Gosling *v.* Gosling, (1859) John 265 ; Wharton *v.* Masterman, [1895] A. C. 186 ; *Re* Trevanion, [1910] 2 Ch. 538.

(*m*) Lassence *v.* Tierney, (1849) 1 Mac. & G. 551 ; Hancock *v.* Watson, [1902] A. C. 14 ; *Re* Currie's Settlement, [1910] 1 Ch. 329.

(*n*) *Re* Wilcock, [1898] 1 Ch. 95, 98.

wards, by the mere expression of a desire, such as "I desire that the property shall be left by the donees to some charitable purpose" or to somebody else (*o*).

Further, it is an established principle that a clear gift in a Will is not to be cut down or revoked by anything subsequent, either in the same Will or in a codicil, which does not with reasonable certainty indicate the intention of the testator to cut it down or revoke it (*p*).

Deferred legacies payable out of real estate only.

The rule as to vesting of legacies payable out of personal estate, which was introduced from the civil law, does not apply to legacies payable out of real estate, which are governed by the common law of England, according to which if a sum of money is given to a person charged upon real estate, and is made payable at a certain age, at marriage, or other event personal to the party to be benefited, and such party dies before the time arrives, the portion or legacy is not to be raised out of the land, but it sinks into it (*q*), and the rule is the same although interest on the sum is given in the meantime (*r*). But if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raisable after the death of the tenant for life notwithstanding the death in the meantime of the party to be benefited (*s*).

Legacies payable out of proceeds of sale of land.

The rules as to vesting which apply to legacies charged on land do not, however, apply to legacies given out of moneys to arise from the sale of land (*t*).

Legacies charged on both real and personal estate.

Where legacies are charged on both real and personal estate, the personal estate is considered the primary fund for

(*o*) *Re* Hamilton, [1895] 2 Ch. 370; *Re* Williams, [1897] 2 Ch. 12; *Re* Oldfield, [1904] 1 Ch. 549; *Re* Conolly, [1910] 1 Ch. 219.

(*p*) Hearle *v.* Hicks, (1832) 1 Cl. & F. 20, 24; Randfield *v.* Randfield, (1860) 8 H. L. C. 225; *Re* Percival, (1888) 59 L. T. 21; *Re* Freeman, [1910] 1 Ch. 681.

(*q*) Evans *v.* Scott, (1847) 1 H. L. C. 43, 57; Parker *v.* Hodgson, (1861) 1 Dr. & Sm. 568, 572; Henty *v.* Wrey, (1882) 21 C. D. 332, 355.

(*r*) Parker *v.* Hodgson, *ubi sup.* Henty *v.* Wrey, *ubi sup.* at p. 357.

(*s*) Evans *v.* Scott, *ubi sup.*

(*t*) *Re* Hart's Trusts, (1858) 3 De G. & J. 195, 203.

their payment (*u*), and so far as the personal fund will extend the same rules apply as if the legacies were payable out of personal estate only ; and so far as the real estate must be resorted to for the payment of the legacies, the case is governed by the same rules as if they were charged on the real estate only (*x*).

Legacies payable out of proceeds of realty and personalty as a mixed fund.

But where the proceeds of realty and personalty are directed as a mixed fund to be applied to the same object, it would seem that this indicates an intention that the same rules shall apply to both, and in that case the rules applicable to personalty apply (*y*).

Effect of successive limitations of personalty to persons absolutely.

Where in a Will there are successive limitations of personal estate in favour of several persons absolutely, the first of those who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken ; the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift (*z*).

Effect of bequest to a person "and in case of his death" to another.

A bequest to a person "and in case of his death" to another, is an absolute bequest to the first legatee, if he survives the testator. Where there is no antecedent estate the contingency is referred to death in the lifetime of the testator ; and when the gift is preceded by a life estate the contingency has reference to the death of the donee, either during the preceding life estate or in the lifetime of the testator. But where the gift over is not on a certain event, as where death is coupled with the contingency of not leaving issue, there is no necessity for limiting the event to the testator's lifetime or the preceding life estate, as the case may be (*a*).

Effect of gift and in case of death without leaving issue.

Effect of gift to the survivors or survivor.

If a legacy be to two or more equally or to the survivors or survivor, the words of survivorship are *primâ facie* to be referred to the period of payment or distribution, so that in

(*u*) See *ante*, p. 460.
(*x*) Williams (10th ed.) 1002.
(*y*) Genery *v.* Fitzgerald, (1822) Jac. 468.
(*z*) *Re* Lowman, [1895] 2 Ch. 348.
(*a*) O'Mahoney *v.* Burdett, (1874) L. R. 7 H. L. 388 ; *Re* Parry & Daggs, (1885) 31 C. D. 130, 133 ; and see *Re* Schnadhorst, [1901] 2 Ch. 338 ; [1902] 2 Ch. 234.

the case of an antecedent life interest the survivorship is ascertained at the death of the tenant for life (*b*).

Effect of Conveyancing Act, 1882, s. 10 (1), as to executory limitations over.

As to executory limitations contained in any instrument coming into operation after the 31st December, 1882, sect. 10 (1) of the Conveyancing Act, 1882, provides as follows: "Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life with an executory limitation over in default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect."

Sect. 2.—*Of Conditional Devises and Bequests.*

(1) *Impossible Conditions Precedent.*

Distinction between devises of realty and bequests of personalty.

As regards devises of realty, which are regulated by the common law of England, if a condition precedent is impossible, as to drink up all the water in the sea, the devise will be void (*c*).

Impossible condition precedent to a devise renders devise void.

Impossible condition precedent to a bequest is nugatory.

As regards legacies which are regulated by the civil law, adopted by Courts of Equity, if a condition precedent to the vesting of a legacy is impossible, the bequest is discharged of the condition; and the legatee is entitled as if the legacy were unconditional (*d*).

Performance of condition precedent to devise.

Where there is a condition precedent to the vesting of the interest of a devisee, and on his failing to perform the condition the property is given over, the condition must be complied with strictly. If it is not so complied with, the property vests in the person in whose favour the gift over is made, and the Court cannot interfere to set up the prior gift (*e*).

(*b*) Cripps *v.* Wolcott, (1819) 4 Madd. 11; *Re* Poultney, [1912] 2 Ch. 541.

(*c*) Williams (10th ed.) 1008.

(*d*) *Ibid.*

(*e*) *Ibid.*, 1013; and see Egerton *v.* Earl of Brownlow, (1853) 4 H. L. C. 1, 18, n., per Ld. Cranworth.

Performance of condition precedent to bequest.

With regard to the performance of conditions precedent relating to legacies, according to the civil law, adopted by Courts of Equity, where a *literal* compliance with the condition becomes impossible from unavoidable circumstances, and without any fault of the party, it is sufficient that it is complied with, as nearly as it practically can be, or, as it is technically called, *cy-près* (*f*). The failure of matters ancillary to the accomplishing of the testator's object may, it would seem, be disregarded (*g*). The rule of the Court is that if the Court can put the parties in the same situation as if the condition had been performed, it will not suffer a forfeiture to attach (*h*).

Failure of matters ancillary to testator's object may be disregarded.

Effect of performance of condition being the motive of the bequest.

If the performance of the condition appears to be the motive of the bequest, and the impossibility of the condition was unknown to the testator, as where a legacy is given on condition the legatee marries the testator's daughter, who happens to be then dead ; or where the impossibility arises from a subsequent act of God, as if she be living at the date of the Will, but dies before the marriage can be solemnised ; the impracticability of the performance will be a bar to the claim of the legatee (*i*).

Time observance may be material.

Time observance may be material to the due performance of a condition, as where the condition is that the legatee shall within a time specified personally apply for his legacy (*k*), or where the condition is that the legatee shall establish his title within a certain time (*l*).

Legatee's ignorance of condition no excuse.

The performance of the condition is not excused by the ignorance of the legatee, the principle being that a person who takes by gift under a Will cannot plead want of knowledge of the contents of the Will as an excuse for not complying with its provisions (*m*).

(*f*) Story, Eq. Jur. s. 291.

(*g*) See Williams (10th ed.) 1013.

(*h*) Hollinrake *v.* Lister, (1826) 1 Russ. 500, 508.

(*i*) Williams (10th ed.) 1008 ; and see Yates *v.* University College of London, (1875) L. R. 7 H. L. 438.

(*k*) Williams (10th ed.) 1014 ; Powell *v.* Rawle, (1874) L. R. 18 Eq. 243.

(*l*) *Re* Hartley, (1887) 34 C. D. 742.

(*m*) Astley *v.* Earl of Essex, (1874) L. R. 18 Eq. 290.

Executor owes no duty to legatee to give notice.

The executor owes no duty to the legatee to give notice of the terms of the legacy, even though he takes a beneficial interest in the legacy on the breach of the condition (*n*).

(2) *Impossible Conditions Subsequent.*

Impossible condition subsequent void notwithstanding gift over.

Where a condition subsequent is impossible, it is the doctrine as well of the common law as of the civil law that the condition is void, and the legacy single and absolute ; and if the performance of the condition subsequent be rendered impossible by the act of God, the gift to which the condition is attached is good, even though there is a gift over on non-performance of the condition (*o*).

Construction of conditions subsequent.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction (*p*). Whether a condition is to be construed as precedent or subsequent must depend on the intention of the testator to be collected from the whole instrument (*q*).

In many cases the Courts have regarded apparent conditions as conditional limitations and construed them as having been substantially complied with by the event which has actually happened, so that since the first limitation cannot take place the subsequent one shall. For instance, a devise on condition that the devisee should give a release within three months after the testator's death, and if he should neglect to give such release then over, and the devisee died in the testator's lifetime ; it was held that this was a conditional limitation and that the devise over took effect (*r*).

With regard to conditions subsequent, the general rule is that they are to be construed with great strictness, as they go to divest estates already vested : Therefore the very event

(*n*) *Re* Lewis, [1904] 2 Ch. 656.

(*o*) Williams (10th ed.) 1009 ; *Re* Greenwood, [1903] 1 Ch. 749 ; *Re* Croxon, [1904] 1 Ch. 252.

(*p*) *Re* Greenwood, *ubi sup.*

(*q*) Egerton *v.* Earl of Brownlow, (1853) 4 H. L. C. 1, 157.

(*r*) See Williams (10th ed.) 1014 *et seq.*, where other instances of the application of this principle are given ; and see Egerton *v.* Earl of Brownlow, *ubi sup.*, at p. 223.

must happen, or the act with all its details must be done, in order to deprive the legatee of his legacy (*s*). Moreover the cesser and the limitation over must fit in with one another, and if there is no person to take under the limitation over the clause is void (*t*).

(3) *Illegal Conditions Precedent.*

Illegal condition precedent, *malum in se*, renders bequest void.

With regard to conditions precedent which are illegal, if performance requires an act which is *malum in se*, as to kill A., burn his house, or the like, then both by the common and civil law not only the condition but the bequest itself is void.

Condition merely contrary to rule of law renders devise void: but in same case the condition of bequest alone is void.

But where the illegality consists merely in the performance of the condition being against a rule or the policy of the law, there although by the common law the devise as well as the condition is equally void as if there existed *malum in se*, by the civil law the condition only is void, and the bequest single and good. Thus, where the testator bequeathed to his niece £2 a month if she lived with her husband, and £5 a month if she lived apart from him, Lord Northington was of opinion that she was entitled to the £5 a month payment; for the condition being *contra bonos mores*, the bequest was single (*u*).

(4) *Illegal Conditions Subsequent.*

Illegal condition subsequent is void and devise or bequest is good.

Where the performance of a condition subsequent is illegal, then, as well at the common law as by the civil law, adopted in the Courts of Equity, the condition is void and the devise or bequest freed from it, as though it had been given unconditionally (*x*). On this principle, a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is, as being contrary to

Condition contrary to public policy

(*s*) Williams (10th ed.) 1017; Harrison *v.* Foreman, (1800) 5 Ves. 207.

(*t*) Musgrave *v.* Brooke, (1884) 26 C. D. 792; *Re* Cornwallis, (1886) 32 C. D. 388.

(*u*) Williams (10th ed.) 1009; and see *Re* Moore, (1888) 39 C. D. 116.

(*x*) Williams (10th ed.) 1010; Egerton *v.* Earl of Brownlow, (1853) 4 H. L. C. 1, 160; and see *Re* Moore, *ubi sup.*

public policy, void (*y*); and a condition is bad which operates to restrain a man from doing his duty (*z*).

So also an original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect; as by a gift over which is void by reason of being too remote (*a*).

Remoteness.

The remoteness against which the rule for prevention of perpetuities is directed is remoteness in the commencement, or first taking effect, of limitations, and not in the cesser or determination of them. An estate that is to arise within the prescribed period may be so limited as to determine on the happening of any event, however remote, as, for example, the indefinite failure of issue of a person, which is too remote a contingency for the commencement of limitations. But an estate can only be made to determine upon an event thus remote when, by its original form and limitation, it will regularly cease by the happening of the contingency, as the term of the duration of the estate: for a power reserved to a person to determine the limitation on such remote event would be void (*b*). It follows that under powers in an antenuptial settlement a life interest may be limited to any child of the marriage until the happening of an event, for instance, until he becomes a member of the Roman Catholic Church (*c*) or so long as he should be living and unmarried, but a gift over to other children of the marriage should the child marry would be void for remoteness, as the class is not necessarily ascertainable within twenty-one years after the death of the survivor of the appointors (*d*).

Uncertainty.

Moreover, the cause of forfeiture must not be vague. To defeat a vested estate, the condition must be such that from its creation the Court can say with reasonable certainty in what events the forfeiture will occur (*e*).

(*y*) *Re* Beard, [1908] 1 Ch. 383.

(*z*) *Re* Sandbrook, [1912] 2 Ch. 471, 477.

(*a*) Williams (10th ed.) 1010; Ring *v.* Hardwick, (1840) 2 Beav. 352.

(*b*) Lewis on Perpetuity, p. 173; Wainwright *v.* Miller, [1897] 2 Ch. 255, 261.

(*c*) Wainwright *v.* Miller, *ubi sup.*

(*d*) *Re* Gage, [1898] 1 Ch. 498.

(*e*) *Re* Sandbrook, [1912] 2 Ch. 471.

Condition repugnant to absolute gift.

Condition restraining alienation.

Again a condition is void which is inconsistent with and repugnant to the gift, as for instance restraining its alienation (*f*), and the law is the same both as to real and personal estate. But although a condition restraining alienation is void, yet property may be given to a man for his life, with a condition so expressed as to amount to a limitation determining the life estate in the event of alienation, and in that case neither the donee nor his assignees can have it beyond the period limited (*g*). Where a life interest is given subject to forfeiture if the tenant for life should charge or incumber the property, and there is a gift over, for instance in favour of children, on such forfeiture, a forfeiture will be produced by a charge or incumbrance, notwithstanding that, in the event which happens of there being no children, there is no person to take under the gift over (*h*). It must, however, be a voluntary alienation to create a forfeiture ; an order for a settlement under the Divorce Acts of 1857 and 1859 will not cause a forfeiture (*i*).

Condition restraining litigation.

A condition of cesser or forfeiture of the interest of a beneficiary by commencing litigation is repugnant and does not apply in the case of a *bonâ fide* action for administration by the beneficiary on the footing of wilful default to enforce his rights (*k*).

Forfeiture in the event of bankruptcy.

Where the words of a proviso for forfeiture on bankruptcy are words of futurity, the forfeiture does not take place if the bankruptcy has been annulled before the first payment becomes due, or in other words before any right to receive the income in question has accrued to the trustee in the bankruptcy (*l*).

(*f*) Bradley *v.* Peixoto, (1797) 3 Ves. 325 ; *Re* Rosher, (1884) 26 C. D. 801 ; *Re* Dugdale, (1888) 38 C. D. 176, 180.

(*g*) Brandon *v.* Robinson, (1811) 18 Ves. 429, 433 ; *Re* Machu, (1882) 21 C. D. 838, 842.

(*h*) Hurst *v.* Hurst, (1882) 21 C. D. 278.

(*i*) 20 & 21 Vict. c. 85, s. 45 ; 22 & 23 Vict. c. 61, s. 5 ; Loraine *v.* Loraine and Murphy, [1912] P. 86, 222.

(*k*) *Re* Williams, [1912] 1 Ch. 899.

(*l*) *Re* Parnham's Trusts, (1876) 46 L. J. Ch. (N. S.) 80, 413 ; Robertson *v.* Richardson, (1885) 30 C. D. 623, 628 ; *Re* Loftus-Otway, [1895] 2 Ch. 235; and see *Re* Laye, [1913] 1 Ch. 298.

A forfeiture clause in a Will, providing that in the event of alienation or bankruptcy the interest of the legatee under the Will shall cease and go over, applies to a bankruptcy either before or after the date of the Will and existing at the testator's death (*m*). But this rule ought not to be applied to any but those particular acts of forfeiture, and ought not, in the absence of express words, to be extended to other acts of forfeiture, as for instance a marriage of a kind forbidden by the testator (*n*).

Absolute interest may be given over before time of possession.

An absolute interest in personalty, whether vested or contingent, may be given over upon alienation before the time of possession (*o*).

Gift over if donee dies without disposing of the property is void.

If there is an absolute bequest of property, with a proviso that if the legatee dies without having disposed of it by Will, or otherwise, his interest in it shall cease and it shall go over to another, the gift over is void and the legacy absolute, since it is an attempt to alter the course of devolution at the moment of devolution and at no other time (*p*), and there is no distinction between realty and personalty in this respect (*q*).

Effect of want of gift over.

Except in the case of a condition *rei non licitæ*, as a condition in restraint of marriage, or not to dispute the Will, or not to aliene, there is no rule of law that a condition subsequent shall operate merely *in terrorem* unless the legacy is given over to another on breach of the condition. Therefore, where there was a condition subsequent in a Will, revoking a bequest to the testator's daughter in case she became a nun, Lord Cranworth held that the condition was a lawful one, and that her interest ceased upon a breach of it, though there was no gift over (*r*).

(*m*) Metcalfe *v.* Metcalfe, [1891] 3 Ch. 1, 4.

(*n*) *Re* Chapman, [1904] 1 Ch. 431; [1905] A. C. 106.

(*o*) Theobald on Wills, (7th ed.) p. 631; Churchill *v.* Marks, (1844) 1 Coll. 441; *Re* Porter, [1892] 3 Ch. 481.

(*p*) Shaw *v.* Ford, (1877) 7 C. D. 669; and see *Re* Percy, (1883) 24 C. D. 616; *Re* Parry and Dagga, (1885) 31 C. D. 130; and see *Re* Crutchley, [1912] 2 Ch. 335, where the condition was "dying intestate or childless or under the age of twenty-one," and the word "or" was read "and."

(*q*) Shaw *v.* Ford, *ubi sup.*

(*r*) *Re* Dickson's Trust, (1850) 1 Sim. N. S. 37.

(5) *Conditions in Restraint of Marriage.*

Conditions not importing absolute celibacy valid.

With regard to conditions in restraint of marriage, conditions in absolute restraint of marriage are void (*s*), but conditions which do not directly or indirectly import an absolute injunction to celibacy are valid (*t*). Thus conditions restraining marriage under twenty-one, or other reasonable age, without consent (*u*), or even during the whole life of the donee, without consent (*x*), or requiring or prohibiting marriage with particular persons (*y*), are valid. Such conditions in partial restraint only are effectual provided there is a gift over, but if there is no gift over in respect of personal estate they are regarded as declarations *in terrorem* merely (*z*), although in respect of real estate the condition will have effect notwithstanding there is no devise over (*a*). The rule against conditions in restraint of marriage being a rule adopted by Courts of Equity from the decisions of the Ecclesiastical Courts in respect of personal estate over which such Courts had jurisdiction, and a modification of the rule of the civil law, it has no application to real estate which is governed by the common law, nor to charges on land (*b*). The rule, however, applies to a gift of money arising from the sale of real estate and to a mixed fund of proceeds of realty and personalty directed to be converted (*c*), and as a rule of construction it would seem to apply in like manner to real and personal estate given together without any trust for conversion (*d*). With regard, however, to devises of real estate it would seem that a restriction in general restraint of marriage would be

(*s*) Morley *v.* Rennoldson, (1843) 2 Hare, 570.

(*t*) Scott *v.* Taylor, (1788) 2 Dick. 712, 721.

(*u*) Beaumont *v.* Squire, (1852) 17 Q. B. 905. As to what is sufficient consent see cases cited in Williams (10th ed.) 1023 *et seq.*

(*x*) Lloyd *v.* Branton, (1817) 3 Mer. 108; *Re* Whiting's Settlement, [1905] 1 Ch. 96.

(*y*) Hodgson *v.* Halford, (1879) 11 C. D. 959; Jenner *v.* Turner, (1880) 16 C. D. 188, and other instances given in Williams (10th ed.) 1021.

(*z*) Williams (10th ed.) 1022.

(*a*) Jenner *v.* Turner, *ubi sup.* at p. 196.

(*b*) Harvey *v.* Aston, (1737) 1 Atk. 361, 379; Jones *v.* Jones, (1876) 1 Q. B. D. 279.

(*c*) Bellairs *v.* Bellairs, (1874) L. R. 18 Eq. 510.

(*d*) Duddy *v.* Gresham, (1878) 2 L. R. Ir. 443, 468.

held void on grounds of public policy (*e*). The rule that a general restraint upon marriage is against the policy of the law does not apply to second marriages, so that a condition or gift over on the marriage of a widow (*f*) or a widower (*g*) is valid.

Limitation until marriage.

A gift to a legatee for life if she shall so long remain unmarried is valid (*h*). Limitations until marriage may be good where limitations defeasible on marriage would be bad (*i*).

In the case of a condition imposed by Will involving consent to marriage, and the marriage takes place in the lifetime of the testator with his consent, it is for all the purposes of the Will a fulfilment of the condition (*k*).

(6) *Legacy to a Person in the Character of Executor.*

Presumption as to legacy to executor.

A legacy to a person in the character of executor is considered to be given upon the implied condition that he clothe himself with that character.

Presumption may be rebutted.

The presumption is that a legacy to a person appointed executor is given to him in that character, and it is on him to show something in the nature of the legacy, or other circumstances arising on the Will, to repel that presumption (*l*).

Parol evidence admissible.

Parol evidence is admissible to rebut this as well as any other presumption (*m*). If the presumption is rebutted the legatee will be entitled to receive the legacy whether he accepts the office or not.

What sufficient indication of intention to rebut presumption.

The fact of a legacy being payable to a legatee (who is named as one of the executors) after the death of a tenant for life rebuts the presumption that the legacy was given to him in his character of executor (*n*). So where the gift is

(*e*) Jarman on Wills, (5th ed.), p. 892.

(*f*) Newton *v.* Marsden, (1862) 2 J. & H. 356.

(*g*) Allen *v.* Jackson, (1875) 1 C. D. 399.

(*h*) Heath *v.* Lewis, (1853) 3 De G. M. & G. 954.

(*i*) See Evans *v.* Rosser, (1864) 2 H. & M. 190, 195.

(*k*) *Re* Park, [1910] 2 Ch. 322.

(*l*) Williams (10th ed.) 1027; *Re* Appleton, (1885) 29 C. D. 893, 895.

(*m*) *Re* Appleton, *ubi sup.*

(*n*) *Re* Reeve's Trusts, (1877) 4 C. D. 841.

expressed to be in respect of the testator's relationship, or as a mark of respect or friendship, the presumption is rebutted by the context (*o*). The mere fact, however, that the gift of the legacy precedes the appointment of the legatee as executor, or that the legacies to several persons appointed executors differ either in their amount or subject-matter, is not enough by itself to rebut the presumption (*p*).

Executor need not prove Will provided he manifests intention to act.

It is not absolutely necessary to prove the Will in order to entitle a person to a legacy as executor. It will be a sufficient assumption of his character of executor if the legatee unequivocally manifests an intention to act in the executorship, although prevented by death from proving the Will (*q*).

Request that executor should have handsome gratuity void: *secus*, reasonable remuneration.

A request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty (*r*). But a gift of reasonable remuneration to an executor for his trouble is effectual, and the Court will ascertain the amount (*s*).

(*o*) See Williams (10th ed.) 1029 *et seq.*

(*p*) *Re* Appleton, *ubi sup.*

(*q*) Williams (10th ed) 1030 ; Lewis *v.* Matthews, (1869) L. R. 8 Eq. 277.

(*r*) Jubber *v.* Jubber, (1839) 9 Sim. 503.

(*s*) Jackson *v.* Hamilton, (1846) 3 J. & L. 702.

CHAPTER XXXVI.

OF THE EXECUTOR'S ASSENT AND OF THE PAYMENT OF LEGACIES AND DISTRIBUTION.

SECT. 1.—*Protection after issuing Advertisements.*

Effect of 22 & 23 Vict. c. 35, s. 29.

AFTER issuing advertisements, and taking the steps pointed out by the Act 22 & 23 Vict. c. 35, s. 29 (*a*), an executor or administrator will have the same protection against debts or claims, of which he has no notice, as if he had administered the estate under a decree of the Court (*b*); and after satisfying all claims of which he has notice the executor, or administrator with the Will annexed, may safely assent to the specific legacies, and pay the pecuniary legacies, and distribute the residue; and in the case of an intestacy the administrator may, in like manner, distribute the estate among the next-of-kin.

Sect. 29 of 22 & 23 Vict. c. 35 is not confined to claims of creditors, but applies also to persons having claims as next-of-kin. It also affords protection to the sureties in an administration bond (*c*).

SECT. 2.—*Of the Executor's Assent.*

Assent necessary to complete legatee's title.

Inasmuch as the executor is responsible to the creditors for the satisfaction of their claims to the extent of the whole of the assets, as a protection to the executor the law imposes the necessity that every legatee, whether general or specific, and whether of chattels real or personal, must obtain the executor's assent to the legacy before his title as legatee can be complete and perfect (*d*). But before such assent the

But before assent has transmissible right.

(*a*) See *ante*, p. 397.

(*b*) Clegg *v.* Rowland, (1866) L. R. 3 Eq. 368.

(*c*) Newton *v.* Sherry, (1876) 1 C. P. D. 246.

(*d*) Williams (10th ed.) 1101.

legatee has an inchoate right to the legacy, such as is transmissible to his own personal representatives in case of his death before it be paid or delivered (*e*).

Before assent executor may maintain trover or trespass against legatee.

It follows from the rule as to the necessity of the executor's assent, that if, without it, the legatee takes possession of the thing bequeathed, the executors may maintain an action of trespass or trover against him. So, although a chattel, real or personal, specifically bequeathed, be in the custody or possession of the legatee, and the assets be fully adequate to the payment of debts, he has no right to retain it in opposition to the executor: by whom, in such case, an action will lie to recover it (*f*).

Whether the executors are right in withholding their assent is a question for the consideration of a Court of Equity (*g*).

After assent legatee may maintain action at law.

After assent to the bequest of a specific chattel it vests absolutely in the legatee, and he can maintain an action at law for it, even against the executor himself (*h*). But no action at law will lie for a general legacy (*i*), or for a share of residue (*k*).

So the title to leaseholds upon the assent of the executor vests absolutely in the legatee, without any deed of assignment (*l*).

The assent has relation to the time of the testator's death (*m*), but it can operate only in favour of the legatee to whom the legacy is given, and not in favour of a stranger, and, therefore, if by codicil, subsequently discovered, the testator revoked the specific legacy given by the Will, and gave it to another legatee, the latter can recover not only the legacy, but the mesne profits, from the person whose legacy was so revoked (*n*).

(*e*) Williams (10th ed.) 1101.
(*f*) *Ibid.*, 1103.
(*g*) Elliott *v.* Elliott, (1841) 9 M. & W. 23, 26.
(*h*) *Ibid.*, ; Doe *v.* Guy, (1802) 3 East, 120, 123.
(*i*) Deeks *v.* Strutt, (1794) 5 T. R. 690.
(*k*) Jones *v.* Tanner, (1827) 7 B. & C. 542; and see Williams (10th ed.) 1566.
(*l*) *Re* Culverhouse, [1896] 2 Ch. 251.
(*m*) Williams (10th ed.) 1108.
(*n*) *Re* West, [1909] 2 Ch. 180.

With regard to real estate, which now vests in the personal representative, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), provides as follows :—

Effect of Land Transfer Act, 1897, as to real estate.

Sect. 2 (1). "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

(2) (*inter alia*) "The powers, rights, duties and liabilities of personal representatives in respect of personal estate shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him." The restriction contained in this sub-section against some or one of several joint personal representatives selling or transferring real estate without the authority of the Court is repealed by the Conveyancing Act, 1911 (*o*).

Sect. 3 (1). "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his Will or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge ; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

The charge subject to which the assent or conveyance is made does not extend to debts for which prior to the Act the personal representative would not have been liable as regards the personal estate, for instance, for debts of which he has no notice after having issued the proper advertisements under s. 29 of the Act 22 & 23 Vict. c. 35. Therefore the devisee

(*o*) See *ante*, p. 235.

after assent or conveyance can make a good title to a purchase without regard as to whether there may be other debts of which the legal personal representative had not had notice (*p*).

Sect. 3 (2). "At any time after the expiration of one year from the death of the owner of the land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land either solely or jointly with the personal representatives."

Assent may be either express or implied.

Assent on the part of the executor may be either express or implied (*q*); whether there has been an assent or not may involve matter of law, but it is generally a question of fact (*r*).

What amounts to assent.

Where an executor assents to a taking by one of several legatees of one specific thing it is necessarily an unqualified assent, being a parting with his interest in the chattel altogether; but where there are several chattels bequeathed, the assent given to a particular chattel is not necessarily an assent to all, since the executor may withhold his assent as to part (*s*).

Assent to particular chattel not assent to other chattels.

Assent to particular interest is an assent to interests in remainder.

An assent to the estate of a legatee for life is an assent to the bequest in remainder (*t*).

Assent to part of residue is assent to the whole.

So an assent to take part as residuary legatee is an assent to take the whole, because it admits that there is a residue, and that the debts and legacies, which alone could entitle the executor to withhold his assent, are paid (*u*).

Payments on account do not amount to assent to whole legacy.

The mere fact that an executor has made general payments to or for the benefit of a legatee of leaseholds and other

(*p*) *Re* Cary and Lott's Contract, [1901] 2 Ch. 463.

(*q*) Williams (10th ed.) 1104, and see there the numerous instances given as to what may constitute assent.

(*r*) Elliott *v.* Elliott, (1841) 9 M. & W. 23, 27.

(*s*) *Ibid.*

(*t*) *Ibid.*; Stevenson *v.* Mayor of Liverpool, (1874) L. R. 10 Q. B. 81.

(*u*) Elliott *v.* Elliott, *ubi sup.*

property—not specifically out of or on account of his rents—was held, in the absence of representations on the subject by the executor to the legatee, not sufficient to enable the Court to infer that the legacy had been assented to (*x*). The act or expression to be sufficient should be unambiguous, since where an act or expression is ambiguous, and applies equally to either view of a question, it is no evidence at all for the jury (*y*).

Conditional assent.

A conditional assent is sufficient only where it is the case of a condition subsequent, or such a one as the executor had no authority to annex for his own benefit, since failure in performing will not divest the legatee of his legacy (*z*).

Retraction of assent.

As a general proposition, an assent cannot be retracted (*a*).

Assent before probate.

A person appointed executor may assent to a legacy before he proves the Will, and his assent will be effectual though he should die before probate (*b*).

Assent of one of several executors; to his own legacy.

The assent of any one of several executors is sufficient, even to his own legacy, without the others; and if the subject be entire and given to all the executors, the assent of any one of them to his own proportion will be sufficient (*c*).

Possession of executor legatee *primâ facie* referable to his representative character.

Upon general principles, when an executor, who is also a specific legatee, takes possession, *primâ facie*, he does so by virtue of his character of executor and not in that of legatee. But the executor, having taken possession, may afterwards expressly, or by implication, elect to treat his possession as that of legatee and not of executor, and that whether he be entitled to the subject-matter of the legacy absolutely, or for a qualified interest only with a limitation over to others. In the latter case the assent of the executor, in general, enures, not only for his own benefit, but for the benefit also of those who take after him (*d*). Accordingly, where an executor

(*x*) Thorne *v.* Thorne, [1893] 3 Ch. 196.

(*y*) Doe *v.* Harris, (1847) 16 M. & W. 517, 520.

(*z*) Williams (10th ed.) 1106; Elliott *v.* Elliott, *ubi sup.*, at p. 28.

(*a*) See *post*, p. 595.

(*b*) Williams (10th ed.) 1107.

(*c*) Williams (10th ed.) 1114; Townson *v.* Tickell, (1819) 3 B. & Ald. 31, 40.

(*d*) Trail *v.* Bull, (1853) 22 L. J. Ch. 1082, per Ld. Cranworth.

takes an interest in a leasehold estate for his life, he must do something more than enter in order to give assent to the legacy, as the entry is referable to his character of executor, and is not evidence of an assent to the legacy (*e*).

Executor legatee renouncing probate, his assent ineffectual.

If an executor legatee renounce probate, his assent to his own legacy will be ineffectual; and if he take the thing bequeathed without the permission of the administrator *cum testamento annexo*, he will incur the same liabilities as any other legatee so acting (*f*).

Executor trustee assenting constitutes himself trustee.

Upon assenting to a specific bequest given to them in trust, executors forthwith become trustees thereof. Whether such assent has been given is often of importance, having regard to the distinction between the liability of several executors and that of trustees (*g*). Moreover, executors, who have set apart and appropriated assets to meet a trust legacy can no longer retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator (*h*).

Although, as a general rule, where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor (*i*), yet if where a person is both executor and trustee, and a long time has elapsed during which there is no evidence of the executor having anything to do in the character of executor, and it is admitted there are no debts, and no other reason for selling is suggested, it will be inferred that his title is that of trustee, and that he has ceased to have the powers of executor (*k*).

(*e*) Doe *d.* Hayes *v.* Sturges, (1816) 7 Taunt. 217; Trail *v.* Bull, *ubi sup.*

(*f*) Williams (10th ed.) 1114; and see 20 & 21 Vict. c. 77, s. 79, *ante*, p. 62.

(*g*) Dix *v.* Burford, (1854) 19 Beav. 409; and see *ante*, p. 5.

(*h*) Ballard *v.* Marsden, (1880) 14 C. D. 374; and see *ante*, p. 5.

(*i*) *Re* Venn & Furze's Contract, [1894] 2 Ch. 101; Solomon *v.* Attenborough, [1911] 2 Ch. 159; [1912] 1 Ch. 451; and see *ante*, pp. 5, 243.

(*k*) *Re* Verrell's Contract, [1903] 1 Ch. 65; Attenborough *v.* Solomon, [1913] A. C. 76.

SECT. 3.—*Of the Time of Payment of Legacies.*

Payment cannot be enforced before 12 months.

An executor cannot be compelled to pay a legacy before the expiration of twelve months from the testator's death, notwithstanding a direction in the Will that payment should be made sooner. There is, however, no rule which prevents an executor, if he thinks proper, paying legacies or handing over the residue within the period of twelve months, as it is only for the convenience of the executor in order to ascertain the debts and assets of the testator (*l*).

Rule for convenience of executor only.

Court may allow payments of income or capital on account.

Where any real or personal estate forms the subject of any proceedings in the Chancery Division, Ord. 50, r. 9, of the R. S. C. provides that if the judge is satisfied that the same will be more than sufficient to answer all claims thereon, he may at any time after the commencement of the proceedings allow the parties interested the whole or part of the income thereof, or part of the capital of personal estate.

If legacy liable to be divested fund is kept *in medio.*

In the case of an immediate legacy vested but subject to be divested upon a future contingency, in the nature of a condition subsequent, Lord Thurlow in *Griffiths* v. *Smith* (*m*) directed payment to the legatee without security, and this was followed by Sir W. Grant in *Fawkes* v. *Gray* (*n*). But it would seem that these cases are contrary to the whole stream of equity since. If it is liable to be divested by any event, the course of the Court then is not to pay, but keep the fund *in medio* until the contingency is determined (*o*). In *Colston* v. *Morris* (*p*), where a legacy was given to a father on condition that he did not interfere with the education of his daughter, the Court required security from the father before paying him the legacy.

Payment of annuities.

A bequest of an annuity, unless otherwise directed, commences from the death of the testator, and the first payment is paid at the end of the year from the testator's death (*q*).

(*l*) Williams (10th ed.) 1114.
(*m*) (1790) 1 Ves. 97.
(*n*) (1811) 18 Ves. 130.
(*o*) Colhoun *v.* Thompson, (1828) 2 Molloy, 281, 287, 290, per Lord Chancellor Hart.
(*p*) (1821) 6 Madd. 89.
(*q*) Gibson *v.* Bott, (1802) 7 Ves. 89, 96; *Re* Robbins, [1907] 2 Ch. 8, 13.

Where an annuity is given by Will with a direction that it shall be paid monthly, the annuity commences from the testator's death, but the first payment is made at the end of a month after the testator's death (*r*). But where an annuity is by Will directed to be payable quarterly, the first payment to be made within eighteen months after the testator's death, the annuity does not commence till fifteen months from the death of the testator (*s*).

Direction to purchase annuity.

Where an annuity is directed by the testator to be purchased, the right to take its value in cash, instead of the annual sum, vests in the annuitant on the testator's death, and should the annuitant die before it is purchased, his legal personal representatives are entitled to the sum which at the date of the testator's death would have purchased the annuity (*t*).

But where the annuity is directed to be paid by equal quarterly payments the first to be made at the end of three calendar months after the testator's death, with a further direction to provide for the payment of the annuity by purchasing a government annuity, should the annuitant die before the government annuity is purchased, but after one or more payments made to him, his legal personal representative is entitled to be paid the sum which would have purchased the annuity as at the date of the last payment to him, with interest on the capital value of the annuity from that date (*u*).

General legacy for life with remainder over, first payment of interest at end of two years.

If a general legacy is given for life with remainder over, no interest is due till the end of two years, since the legacy is not payable till the end of one year after the testator's death, and until the legacy is payable there is no fund to produce interest (*x*).

Duration of annuity.

As a general rule a gift of an annuity to A. is a gift of the annuity during the life of A. and nothing more (*y*). On the

(*r*) Houghton *v.* Franklin, (1823) 1 S. & S. 390.

(*s*) Irvin *v.* Ironmonger, (1831) 2 R. & My. 531.

(*t*) *Re* Robbins, [1906] 2 Ch. 648; [1907] 2 Ch. 8.

(*u*) *Re* Brunning, [1909] 1 Ch. 276.

(*x*) Gibson *v.* Bott, *ubi sup.*

(*y*) Blight *v.* Hartnoll, (1881) 19

other hand *primâ facie* a gift of the produce of a fund is a gift of that produce in perpetuity, and is consequently a gift of the fund itself (*z*); and it makes no difference that the fund is given to trustees to apply the income (*a*).

A trust to pay an annuity out of income without limit of time during which the income is so available and a disposition of the estate subject to the annuity, is not merely a continuing charge upon income, but a charge upon the *corpus* (*b*).

A gift of income to a woman so long as she remains unmarried, in the absence of a gift over on death or marriage, is an indefinite gift of income and confers an absolute interest. But a gift of income during widowhood determines with the life of the widow (*c*).

SECT. 4.—*Appropriation of Funds to provide for Future and Contingent Legacies.*

Vested legacy payable *in futuro*.

If there is a vested legacy which will certainly be payable *in futuro*, the legatee is entitled to insist upon the executor investing the amount of it, and when it is done that will be an appropriation in the strict sense of the term, and the gain or loss upon the investment (as the case may be) will go to or fall upon the legatee (*d*).

Contingent legacy.

Where the legacy is contingent, and the legatee is, on the happening of the contingency, to take the legacy without interest in the meantime, the legatee is not entitled to require a sum to be appropriated to answer the legacy. It remains part of the testator's estate. It need not prevent the executor or the Court distributing the residue, after taking reasonable care to provide for the contingent legacy; but the fund so set apart would be set apart, not as a legacy, but to answer or

C. D. 294; *Re* Morgan, [1893] 3 Ch. 222, 228.

(*z*) Adamson *v.* Armitage, (1815) 19 Ves. 416.

(*a*) Page *v.* Leapingwell, (1812) 18 Ves. 463; Haig *v.* Swiney, (1823) 1 Sim. & Stu. 487.

(*b*) *Re* Howarth, [1909] 2 Ch. 19; *Re* Watkins' Settlement, [1911] 1 Ch. 1; *Re* Young, [1912] 2 Ch. 479.

(*c*) Rishton *v.* Cobb, (1839) 5 My. & Cr. 145; *Re* Howard, [1901] 1 Ch. 412; *Re* Mason, [1910] 1 Ch. 695.

(*d*) *Re* Hall, [1903] 2 Ch. 226.

secure the legacy, and the fund will still remain part of the estate, the income ought to be paid as part of the residue, and on the happening of the contingency the legatee will be entitled to receive the amount of the legacy in full in cash (*e*).

Payment into Court not ordered unless fund in jeopardy.

Of late years the leaning of the Court is not to order a fund to be paid into Court to provide for a legacy, but rather to get rid of a fund where there are proper trustees to take care of it. But if proper trustees are not kept up, or if for any other cause the fund is in jeopardy, an application can be made for its protection by the Court (*f*).

Annuitant entitled only to have annuity sufficiently secured.

As against the residuary legatee an annuitant is not entitled to have the personal estate converted and an amount sufficient to secure the annuity invested ; he is only entitled to have the annuity sufficiently secured (*g*). And where an annuity is payable out of the income of the clear residuary estate, the Court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatees (*h*). This jurisdiction, however, is founded on administration only and the exercise of it does not release the rest of the estate, which, if the fund set apart fails, may be followed into the hands of the residuary legatees (*i*).

Sect. 5.—*Of Interest on Legacies.*

General legacy bears interest from a year after testator's death.

A legacy bequeathed generally, without assigning any time for payment, bears interest only from a year after the death of the testator, though the fund out of which it is to be paid consists of stock and other matters yielding immediate profit. And if the executor has assets, the pecuniary legacies bear interest from the expiration of the year, although the assets have not been productive (*k*). In the case of a demonstrative legacy, if there is no time expressly directed for payment, it makes no difference that the pro-

(*e*) *Re* Hall, [1903] 2 Ch. 226.

(*f*) *Re* Braithwaite, (1882) 21 C. D. 121.

(*g*) *Re* Parry, (1889) 42 C. D. 570.

(*h*) Harbin *v.* Masterman, [1896] 1 Ch. 351.

(*i*) *Re* Evans and Bettell's Contract, [1910] 2 Ch. 438.

(*k*) Pearson *v.* Pearson, (1802) 1 Sch. & Lef. 10.

perty out of which it is directed to be paid is a reversionary interest (*l*). And where legatees have had to wait for the payment of their legacies until after the falling in of a reversionary interest, they are entitled not merely to six years' arrears of interest, but to interest on their legacies from the expiration of one year after the testator's death (*m*).

Deferred legacy.

Interest does not become payable on a legacy before it is due, and since a legacy to a person in his capacity of executor is not due unless he accepts the office and duties of executor, and an infant cannot accept the office of executor, it follows that a legacy to an infant as executor does not carry interest until he is of age (*n*).

Where the direction to pay is at a fixed time the legacy bears interest as from that time, but where the direction is to pay within a fixed period the question arises whether the delay authorised was for the personal benefit of the residuary legatee, as in *Thomas* v. *Att.-Gen.* (*o*), in which case interest does not begin to run until the end of the period, or the postponement is simply for the convenience of the testator's estate for the purpose of giving the executors time to collect and get in the assets, in which case, assuming the executors have assets in hand actually realized, the unpaid legacies carry interest from the expiration of one year after the testator's death (*p*).

Vested legacy subject to be divested.

A vested legacy subject to be divested on the happening of a particular event, as the death of the legatee under the age of twenty-one years, carries interest from a year after the testator's death, and should the legatee die under the age of twenty-one years, any arrears of interest up to that time will be payable to his legal personal representative (*q*).

And where a legacy is given upon trust for a man for life or until bankruptcy and subject thereto for his children as he

(*l*) Lord *v.* Lord, (1867) L. R. 2 Ch. 782; *Re* Walford, [1912] 1 Ch. 219, A. C. 658.

(*m*) *Re* Blachford, (1884) 27 C. D. 676.

(*n*) *Re* Gardner, (1892) 67 L. T. (N. S.) 552.

(*o*) (1837) 2 Y. & C. 525.

(*p*) Olive *v.* Westerman, (1884) 53 L. J. Ch. 525.

(*q*) *Re* Buckley's Trusts, (1883) 22 C. D. 583.

should appoint and in default of appointment for his children equally, on his bankruptcy and until the children's interests are divested by an appointment the income of the trust fund is distributable in equal shares among his children (*r*).

Contingent legacy.

A contingent legacy does not carry interest until it vests, but where there is a severance of the legacy from the rest of the estate, if the legacy is severed merely for purposes of administration, as because the residue is to be paid over at once, or to be invested in land, the contingent legatee is not entitled to the income of the fund in the meantime until the legacy vests, as the funds remain residue until the contingency happens. But if a severance from the residue is directed for any purpose connected with the legacy itself, that fact, without anything else, is sufficient to make the legacy carry interest, and if the legacy vests by the happening of the event, the legatee will be entitled to the income accrued in the meantime. The difficulty is in the application of the rule to particular instances (*s*).

Legacy in satisfaction of debt.

Where a legacy is decreed to be a satisfaction of a debt, the Court gives interest from the testator's death, for the satisfaction must take place immediately at the testator's death (*t*).

Legacy in lieu of dower.

But a legacy to the testator's wife in lieu of dower or freebench carries interest only from the expiration of a year from the testator's death, since this is a case of election (*u*).

Legacy to infant by testator *in loco parentis*.

Where a legacy is given to an infant by a parent, or one *in loco parentis*, interest from the testator's death is allowed as a provision for maintenance (*x*). This exception does not extend to a provision for an adult child (*y*), or a wife (*z*).

Interest may also be allowed as from the death of the testator from an implied direction, where otherwise there would not be any fund for maintenance, as where a fund is

(*r*) *Re* Masters' Settlement, [1911] 1 Ch. 321.

(*s*) *Re* Inman, [1893] 3 Ch. 518; *Re* Snaith, (1894) 71 L. T. 318, per North, J.

(*t*) Clark *v.* Sewell, (1744) 3 Atk. 99.

(*u*) *Re* Bignold, (1890) 45 C. D. 496.

(*x*) *Re* Bowlby, [1904] 2 Ch. 685.

(*y*) Wall *v.* Wall, (1847) 15 Sim. 513.

(*z*) *Re* Whittaker, (1882) 21 C. D. 657.

given " for the use and support of the younger children " of nephews ; but this rule has not been extended to the case of adults ; nor does it extend to the income of a trust legacy to a daughter-in-law subject to the obligation of maintaining her deceased husband's children while minors and unmarried (*a*).

Legacy charged only on land.

In the case of legacies charged upon lands only, where no day of payment is fixed, interest is chargeable from the death of the testator (*b*).

Arrears of annuity.

The general rule of the Court is that arrears of an annuity do not carry interest, and there is no exception to this rule where the annuity was a provision for a wife or child. The cases in which the Court, in the absence of express contract, allows interest are confined to those where the annuitant has held some legal security which but for the interference of the Court he might have made available for the obtaining of interest, or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay (*c*).

It makes no difference whether the annuity is charged on corpus or merely on income (*d*).

Rate of interest.

Where a legacy has not been paid at the proper time, then, as between the legatee and the person entitled to the residue, it has been the rule of the Court ever since *Sitwell* v. *Bernard* (*e*) to allow the legatee interest at the rate of 4 per cent. only (in the absence of special circumstances), even although the residue may have produced interest at a higher rate (*f*).

By Ord. 55, r. 64, where a judgment or order is made directing an account of legacies, interest shall be computed thereon at 4 per cent. from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate is directed by the Will, and in that case according to the Will.

(*a*) *Re* Crane, [1908] 1 Ch. 379 ; *Re* Churchill, [1909] 2 Ch. 431 ; *Re* West, [1913] W. N. 241.

(*b*) Pearson *v.* Pearson, *ubi sup.* ; *Re* Waters, (1889) 42 C. D. 517.

(*c*) Torre *v.* Browne, (1855) 5 H. L. C. 555, 577, per Ld. Cranworth.

(*d*) Wheatley *v.* Davies, (1876) 35 L. T. 306.

(*e*) (1801) 6 Ves. 520.

(*f*) *Re* Campbell, [1893] 3 Ch. 468, 472, per Stirling, J.

Sect. 6.—*Of Currency in which Legacies are to be Paid and Cost of Remittance.*

General rule legacy payable in currency of country where testator died domiciled.

The general rule, apart from the context, is that if a testator domiciled abroad gives a sum of money by Will it shall be paid to the legatee in current money of the country where the testator was domiciled. It is immaterial that the legatee resides elsewhere, or that the assets of the testator are partly in the place of his domicil and partly elsewhere (*g*).

English Courts can only order payment in English currency.

Speaking generally, the Courts of this country have no jurisdiction to order payment of money except in the currency of this country. The sum ordered to be paid must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution. Therefore, in such cases it becomes necessary to consider how much money in English currency the defendant ought to pay the plaintiff. The amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchaseable commodity, *i.e.*, in practice, according to the rate of exchange existing at the particular time between the currencies (*h*).

Mode of ascertaining amount in English currency.

Cost of remittance.

If the legatee requires payment to be made to him at a place elsewhere than where the assets are being administered, he must pay the cost of remittance (*i*), that is the cost of purchasing for and sending to the legatee a draft on the place of remittance in favour of the legatee for the equivalent.

And in all cases where land alone is subjected by Will with the payment of a sum of money, in the absence of any contrary intention to be inferred from the context or circumstances, there is no obligation to pay the money at any place except upon the land, and therefore the cost of remittance to any other place must be paid by the legatee (*k*).

(*g*) Saunders *v.* Drake, (1742) 2 Atk. 465.

(*h*) Manners *v.* Pearson & Son, [1898] 1 Ch. 581.

(*i*) Cockerell *v.* Barber, (1810) 16 Ves. 461; Campbell *v.* Graham, (1830) 1 R. & M. 453.

(*k*) Lansdowne *v.* Lansdowne, (1820) 2 Bligh. 60.

CHAPTER XXXVII.

OF ABATEMENT.

If the estate is insufficient to pay all the legacies in full, the general legacies must abate in equal proportions. General legacies abate rateably.

Where there are general pecuniary legacies and general legacies of stock, such as a general legacy of £10,000 consols, the value of the stock must be estimated according to the price at the end of a year next after the testator's death, when the legatees would have been entitled to have the amount of their legacies purchased and transferred into their names (*a*). Valuation of general legacy of stock.

All simple gifts of annuities are held to be pecuniary legacies (*b*). Valuation of annuities.

Where a Will contains a general gift of an annuity, general gifts of legacies, and a gift of the residue, and the entire estate is insufficient to pay the annuity and the pecuniary legacies, the annuity ought to be valued and the annuitant is entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies ; and although the annuitant should die before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees will have no claim to the surplus of that amount (*c*). Annuitant entitled at once to amount of valuation less abatement :

Where there is a gift of an annuity with a direction to set aside a fund to answer the annuity, and the annuity is payable out of capital as well as income, and there is a gift over of the residue, if the income of the estate is not sufficient to pay the annuity in full, the annuitant is entitled to have the deficiency made up out of capital, but he is not entitled to have the except as between annuitant and residuary legatee.

(*a*) Auther *v.* Auther, (1843) 13 Sim. 422, 440.

(*b*) Creed *v.* Creed, (1845) 11 Cl. & F. 491, 508.

(*c*) Wroughten *v.* Colquhoun, (1847) 1 De G. & Sm. 357.

value of the annuity paid over to him (*d*). But where the question is not one simply as between an annuitant and residuary legatees, but as between an annuitant and pecuniary legatees, then notwithstanding a direction in the Will to set apart and invest a sufficient sum to answer the annuity the course adopted by the Court is to value the annuity as at the date of the death and to treat the amount of the valuation as a legacy, and to make it abate in its due proportion and then to pay the abated amount to the annuitant (*e*).

Notwithstanding annuity liable to cesser during life of annuitant.

Where the annuity payable out of a deficient estate has been valued, the whole amount less the abatement will be directed to be paid to the annuitant, notwithstanding it was payable to him for life or until he should do or suffer some act whereby the annuity or any part thereof, if belonging to him absolutely, would become vested in some other person (*f*).

Married woman annuitant restrained from anticipation.

In *Re Ross* (*g*) the value of an annuity, less abatement, bequeathed to a married woman without power to anticipate, was ordered to be laid out in the purchase of an annuity for her, but the married woman having died before this was done, the capital sum was ordered to be paid to her legal personal representative.

Time and manner of valuing annuities.

As between a general gift of an annuity and general gifts of legacies, where the estate is insufficient to pay all in full, for the purpose of the proportional abatement the value of the annuity is ascertained as at the death of the testator and to such estimated value is added interest at 4 per cent. per annum from the death of the testator down to the time to which interest should be computed on the legacies (*h*).

In the case of several annuitants, if all the annuitants be living at the period of the division, the values must be ascertained as at the death of the testator ; if they be all dead, the values must be taken to be the respective amounts of arrears ; but if some be dead and others living, the values as to the

(*d*) Wright *v.* Callender, (1852) 2 D. M. & G. 652.

(*e*) *Re* Cottrell, [1910] 1 Ch. 402.

(*f*) *Re* Sinclair, [1897] 1 Ch. 921, Kekewich, J., not following Carr *v.* Ingleby, (1831) 1 De G. & Sm. 362, in this respect.

(*g*) [1900] 1 Ch. 162.

(*h*) Carr *v.* Ingleby, *ubi sup.* ; Long *v.* Hughes, (1831) 1 De G. & Sm. 364.

former will be taken at the amount of the arrears, and as to the latter, at the amount of the arrears added to the calculated value of the future payments (*i*).

Reversionary annuities.

There is no difference in principle where the annuity has been given in expectancy on the death of another person (*k*).

In *Re Metcalfe* (*l*), in settling the proportions of abatement, the question was raised whether sums received by immediate annuitants during the first five years ought to be brought into hotchpot, and it was held, on principle, that as the income of the testator's estate, during the first five years after the testator's death, could never have been applicable in payment of the reversionary annuities, the annuitants in possession were not bound to bring into hotchpot sums received out of income.

Annuities given free of duty.

In *Re Wilkins* (*m*), Pearson, J. held where an annuity was given free of duty and there was a deficiency, that the legacy duty payable on the sum apportioned to the annuitant should be deducted from the whole fund and the balance then divided proportionably. But it would seem the better view is that the legacy duty should be treated as an additional legacy and be added to the legacy for the purposes of abatement (*n*).

Abatement as between tenant for life and reversioner; as between annuitant and residue;

The general rule is, that if there be a clear gift of a life interest and of a reversion, and the estate proves insufficient, each party, the tenant for life and the reversioner, must bear the loss in proportion to his interest; but that if there is a gift of an annuity and a residuary gift, the annuity takes precedence, and the whole loss falls on the residuary legatee (*o*).

as between sums payable out of and residue of a specific fund.

Where a specific fund is given upon trust for sale, and thereout to pay £600 to A. and £700 to B., and the legacy of £700 fails by B.'s death in the testator's lifetime, if the specific fund proves deficient to pay both sums of £600 and £700, there will be no abatement of the £600 legacy in favour of the

(*i*) Todd *v.* Bielby, (1859) 27 Beav. 353; Potts *v.* Smith, (1869) L. R. 8 Eq. 683; *Re* Metcalf, [1903] 2 Ch. 424, 428.

(*k*) Potts *v.* Smith, *ubi sup.*

(*l*) [1903] 2 Ch. 424.

(*m*) (1884) 27 C. D. 703.

(*n*) *Re* Turnbull, [1905] 1 Ch. 726.

(*o*) Croley *v.* Weld, (1853) 3 De G. M & G. 993, 995.

residuary legatee, but it will be considered a first charge on the proceeds of sale (*p*). But where a testator, in disposing of a specific fund, after he has given certain portions, comprises the remainder under the term "residue," if, on the construction, he intended the word "residue" to mean a fractional part of the whole, in that case, if the fund proves deficient the loss will fall on all the persons interested in proportion to their shares, although the last portion was called the residue (*q*).

No precedence from moral obligation to provide for legatee;

Near relationship, or that a man is morally bound to provide for his widow and children, does not of itself give to such a legatee priority over mere strangers, if the estate is insufficient to pay all legacies in full (*r*).

nor by direction to pay legacy immediately or by a certain time;

Moreover, a mere direction to pay a legacy immediately, or within one month, or within three months after a testator's decease, is no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is to be presumed that the testator intended all the legacies to be paid in full when he gave them (*s*).

nor by saying "out of the first money" or "in the first place."

So also saying "out of the first money belonging to me," or "imprimis," or "in the first place," is treated, apart from any contrary context, as only consequential to the direction that the legacy should be paid immediately, and such expressions are consistent with the presumed intention that all shall be equally paid in their order, and do not contemplate any insufficiency of estate (*t*).

Legacy to executor.

A legacy to an executor for his trouble in the conduct and management of the testator's estate has no priority over other legacies and must abate (*u*).

Legacy given as price for relinquishment of dower.

But where a legacy is given as a price for the relinquishment of a right to dower, the legatee is considered in the

(*p*) *Re* Tunno, (1890) 45 C. D. 66.

(*q*) Page *v.* Leapingwell, (1812) 18 Ves. 463, and see De Lisle *v.* Hodges, (1874) L. R. 17 Eq. 440.

(*r*) *Re* Schweder's Estate, [1891] 3 Ch. 44.

(*s*) *Ibid.*

(*t*) Blower *v.* Morret, (1752) 2 Ves. Sen. 420; Beeston *v.* Booth, (1819) 4 Madd. 161; Thwaites *v.* Foreman (1844) 1 Coll. 409; *Re* Harris, [1912] 2 Ch. 241.

(*u*) Duncan *v.* Watts, (1853) 16 Beav. 204.

nature of a purchaser and entitled to priority, and consequently not liable to abate proportionately with other legacies ; and it makes no difference that the legacy should exceed in value the right relinquished, or be the only consideration, or merely part of the consideration (*x*). The rule, however, being founded on her right to dower, has no application where the widow had no such right, as where the testator left no real estate, or effectually devised the whole of his real estate (*y*).

Legacy given in satisfaction of ascertained debt.

In *Re Wedmore* (*z*), Kekewich, J. decided that this principle was inapplicable to the case of a legacy given in satisfaction of an ascertained debt, and that if the legatee claims under the Will he takes the legacy subject to the usual rules of administration which affect all legacies ; and the learned judge stated that there was no case among the authorities referred to which touched the question of debt. There are, however, authorities that the principle of treating the legatee as purchaser would not apply if the legatee had not any legal claim against the testator ; as if no debt was actually due, but accounts had subsisted between the testator and the legatee, and the legacy was given on condition that the legatee should execute a general release (*a*) ; or if the legatees were creditors with whom the testator had formerly compounded, they having released their debts (*b*) ; or if the debts were the debts of a relative or third person and not of the testator (*c*). The principle will not be extended (*d*).

Preferential legatee not entitled until debts are satisfied

A preferential legatee, even though the legatee be considered as a purchaser, is not entitled to payment until after all the debts are satisfied (*e*).

When legacies in first part of

Where a testator by Will gave several legacies, and afterwards in the same Will saying that he apprehended there

(*x*) Heath *v.* Dendy, (1826) 1 Russ. 543 ; *Re* Whitehead [1913] 2 Ch. 56, 59 ; and see 3 & 4 Will. 4, c. 105, s. 12.

(*y*) *Re* Greenwood, [1892] 2 Ch. 295.

(*z*) [1907] 2 Ch. 277.

(*a*) Davies *v.* Bush, (1831) 1 You. 341.

(*b*) Coppin *v.* Coppin, (1725) 2 P. Wms. 296.

(*c*) Shirt *v.* Westby, (1809) 16 Ves. 393 ; *Re* Whitehead, *ubi sup.*

(*d*) *Re* Whitehead, *ubi sup.*

(*e*) *Re* Lawley, [1902] 2 Ch. 799, 808.

Will may have precedence of subsequent legacies.

would be a surplus, therefore gave further legacies, it was held that the legacies given in the first part of the Will had preference in a case of deficiency, and that further legacies given by a codicil must be considered as given with the same apprehension of a surplus and could take place only out of the supposed surplus (*f*).

Demonstrative legacy has preference out of specific fund charged.

A demonstrative legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets ; and in this the testator's intention is the principle : for it is inferred that he, in referring to specific parts of his estate for payment of particular legacies intended those legacies to be a preference to others which he had not so secured (*g*).

Specific and demonstrative legacies abate rateably

When the assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate, in proportion to the value of their individual legacies, and a legatee entitled to a demonstrative legacy, in the nature of a specific legacy, must abate with the specific legatees (*h*).

The forgiveness by Will of a debt owing to the testator is a specific legacy, and not liable to abatement with general legacies (*i*).

Effect of direction to pay charitable legacies out of pure personalty.

Where charitable legacies are directed to be paid out of the testator's pure personalty, as a question of intention, it is held that this does not relieve the pure personalty from its obligation to contribute rateably with the rest of the estate to the burden of the administration charges, consequently such charges must be paid rateably out of the whole estate, and the charitable legatees will then take what remains of the pure personalty in part payment of their legacies (*k*).

(*f*) Att.-Gen. *v.* Robins, (1722) 2 P. Wms. 23, followed in Stammers *v.* Halliley, (1841) 12 Sim. 42.

(*g*) Williams (10th ed.) 1100, quoted by Lord Truro in Robinson *v.* Geldard, (1852) 3 Mac. & G. 735, 745 ; see also per Kindersley, V.-C., in Sellon *v.* Watts, (1861) 9 W. R. 847.

(*h*) Williams (10th ed.) 1100.

(*i*) *Re* Wedmore, [1907] 2 Ch. 277.

(*k*) Beaumont *v.* Oliveira, (1869) L. R. 4 Ch. 309.

CHAPTER XXXVIII.

OF MARSHALLING OF ASSETS.

General principle.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person, having an interest in one only, has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both (*a*).

Marshalling in favour of creditors no longer necessary, except in respect of legal and equitable assets.

Inasmuch as since 3 & 4 Will. IV. c. 104 all real estate is assets to be administered in Courts of Equity for the payment of debts, it would seem that marshalling assets in favour of creditors is no longer necessary, except that where judgment or other creditors have received part of their debts in priority out of legal assets they are not allowed to receive anything out of the equitable assets without bringing into hotchpot what they have so received in priority (*b*).

Marshalling in favour of legatees.

Where one legatee has two funds to resort to for the payment of his legacy in full, and another legatee has only the personal estate or one fund to resort to, the Court presumes that the intention of the testator is that all should be paid in full, and therefore marshals the assets. Consequently, where one legatee has a charge upon real estate and the other has no such charge, and the personal estate is not sufficient to satisfy both, the legatee who has a charge shall be paid out of the land in order to leave the personal estate to the other who had no other fund (*c*).

So also in the case of two demonstrative legacies, one payable out of fund A, and the other out of fund A and fund

(*a*) Williams (10th ed.) 1337; Aldrich *v.* Cooper, (1803) 8 Ves. 382, 388; Dolphin *v.* Aylward, (1870) L. R. 4 H. L. 486, 505; Sellon *v.* Watts, (1861) 9 W. R. 847, 848.

(*b*) See Seton (7th ed.) 1604; Haslewood *v.* Pope, (1734) 3 P. Wms. 323.

(*c*) Scales *v.* Collins, (1852) 9 Hare, 656.

B, the party who has a charge on both funds must exhaust that first upon which the other has no charge (*d*).

Assets not marshalled in favour of charitable bequests.

Formerly the Court would not marshal assets in favour of a charitable bequest by throwing debts, funeral and testamentary expenses upon the mixed personalty in exoneration of the pure personalty, but since the Mortmain and Charitable Uses Act, 1891, s. 3, this rule is inapplicable in the case of testators dying after 5th August, 1891 (*e*).

Marshalling for adjusting rights of beneficiaries.

Where creditors have resorted to assets for satisfying their claims out of the prescribed order in which such assets are liable thereto, as between the persons beneficially interested in the assets, the remaining assets will be marshalled so as to adjust the rights of the beneficiaries.

Order of application of assets in payment of debts.

The order in which the assets should be applied in payment of funeral and testamentary expenses and debts is as follows (*f*) :

(1) Residuary personalty.

1. The general or residuary personalty not specifically bequeathed or exonerated or exempted (*g*).

It makes no difference whether the residue be wholly given or wholly undisposed of, or partly given and partly undisposed of, the thing that is taken is of the same quality. The residue for distribution is what remains after payment of debts and all the expenses of administering the estate (*h*).

Lapsed share applicable in same order as if legatee had survived.

Consequently, a lapsed share is applicable in the same order and manner and to the same extent as if the legatee had survived, and the next of kin are entitled to what the deceased legatee would have taken had he survived the testator (*i*).

To exonerate personal estate not

In order to exonerate the personal estate from payment of

(*d*) Sellon *v.* Watts, (1861) 9 W. R. 847.

(*e*) Robinson *v.* Geldard, (1850) 3 Mac. & G. 735 ; Beaumont *v.* Oliveira, (1869) L. R. 4 Ch. 309 ; and see Seton (7th ed.) p. 1307.

(*f*) See Williams (10th ed.) 1343, and Seton (7th ed.) p. 1604. As to funeral and testamentary expenses, see *ante*, p. 343 ; *Re* Pullen, [1910] 1 Ch. 564, 570, *post*, p. 560.

(*g*) Manning *v.* Spooner, (1796) 3 Ves. 117 ; Harwood *v.* Oglander, (1800) 8 Ves. 124.

(*h*) Shuttleworth *v.* Howarth, (1841) Cr. & P. 228 ; Elborne *v.* Goode, (1844) 14 Sim. 165, 178.

(*i*) Fisher *v.* Fisher, (1838) 2 Keen 610 ; Trethewy *v.* Helyar, (1876) 4 C. D. 53 ; Blann *v.* Bell, (1877) 7 C. D. 382.

debts and legacies it is necessary not merely to charge the real estate but the Will must exempt the personal estate—not necessarily by express words but by showing an intention beyond all doubt (*k*).

sufficient to charge real estate.

There would seem to be no authority which makes general personal estate, comprised in a residuary bequest, the primary fund for the payment of debts as against personal estate specifically appropriated to that purpose (*l*). But the exoneration of the general personal estate will not operate if the residue is undisposed of. So that where there is a specific bequest of chattels in trust to sell, and in the first place to pay thereout the debts and then to divide the residue among certain persons, and there is no general residuary gift of personal estate, the debts are primarily payable out of the general residue (*m*).

Personal estate specifically appropriated.

It is a general rule, in the absence of any expression of intention to the contrary, that if a testator charges real estate with payment of debts in exoneration of his personal estate, and bequeaths the personal estate to particular individuals, he is held to have intended to exonerate his personal estate for the benefit only of those legatees ; and, therefore, if the bequest of the personal estate fails, whether by the death of the legatees in the lifetime of the testator, or by reason of the Statute of Mortmain, so that the personal estate goes to other persons than those intended by the testator, those persons are not entitled to the benefit of the exoneration (*n*).

Charge of real estate in exoneration of personal estate does not exonerate lapsed share.

In *Kilford* v. *Blaney* (*o*), Fry, L.J., stated that in his view the above rule is only a branch of the more general principle —that where the gift to the person intended to be benefited by the exoneration fails the exoneration itself fails, the right to the benefit of the exoneration being in fact a part of the

(*k*) See note to Lutkins *v.* Leigh, (1734) Cas. Temp. Talbot 53 ; Trott *v.* Buchanan, (1885) 28 C. D. 446, 453 ; *Re* Smith [1913] 2 Ch. 216.

(*l*) Trott *v.* Buchanan, *ubi sup.*, at p. 456.

(*m*) Newbegin *v.* Bell, (1857) 23 Beav. 386 ; Hewett *v.* Snare, (1847) 1 De G. & Sm. 333 ; *Re* Grainger, [1900] 2 Ch. 756 ; [1902] A. C. 1.

(*n*) Dacre *v.* Patrickson, (1860) 1 Dr. & Sm. 182, 187.

(*o*) (1885) 31 C. D. 56, 66.

legacy which fails and that that principle applies whether the property dealt with be realty or personalty.

Mixed fund of realty and personalty: how apportionment effected on failure of trusts.

Where a testator creates a mixed general fund from real and personal estate and directs it to be applied in payment of debts, there the real and personal estate must contribute in proportion to their relative amounts (*p*). And where residuary real and personal estate was given upon trust for sale and out of the proceeds to pay debts, and certain shares of the residue were undisposed of, and the only real estate forming part of the residue consisted of a contingent reversion created by the Will itself expectant on prior life interests given by the Will in the same real estate, upon falling in of the real estate it was held that the debt ought to be borne by the realty and personalty in the proportion which the proceeds of sale of the realty which fell into residue bore to the personalty, and not according to the value of the contingent reversionary interest in the real estate at a year from the testator's death as in the case of a reversionary interest of which the testator was possessed at the date of his death (*q*).

(2) Real estate appropriated for payment of debts.

2. Real estates particularly appropriated to or devised in trust for, and not merely charged with, the payment of debts (*r*).

(3) Real estate descended.

3. Real estates descended, whether acquired before or after the making of the Will (*s*).

Where the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personalty the heir-at-law is not entitled to have the duty paid out of such personalty in exoneration of the undisposed of realty (*t*).

(4) Real estate charged with payment of debts.

4. Real estates devised, charged with the payment of debts (*u*).

(*p*) Roberts *v.* Walker, (1830) 1 R. & My. 752; Simmons *v.* Rose, (1856) 6 De G. M. & G. 411; Allan *v.* Gott, (1872) L. R. 7 Ch. 439, 442; and see *Re* Raggi, [1913] 2 Ch. 206.

(*q*) *Re* Moore, (1907) W. N. 181.

(*r*) Manning *v.* Spooner, (1796) 3 Ves. 117; Harwood *v.* Oglander, (1800) 8 Ves. 124; Phillips *v.* Parry, (1856) 22 Beav. 279; Stead *v.* Hardaker, (1873) L. R. 15 Eq. 175.

(*s*) Wride *v.* Clark, (1787) 2 Bro. C. C. 261, n.; Harwood *v.* Oglander, *ubi sup*; Row *v.* Row, (1869) L. R. 7 Eq. 414; Stead *v.* Hardaker, *ubi sup.*, per Malins, V.-C., at p. 177.

(*t*) *Re* Pullen, [1910] 1 Ch. 564.

(*u*) Wride *v.* Clark, *ubi sup*; Harwood *v.* Oglander, *ubi sup.*

Where a testator gives a specific or a pecuniary legacy and devises lands to pay his debts, if a simple contract creditor comes upon the personal estate, and exhausts it so far as to break in upon the specific or pecuniary legacy, the legatee shall stand in the place of the creditor to receive satisfaction out of the fund to be raised for payment of debts (*x*). The Act 3 & 4 Will. IV. c. 104 has not affected the law in this respect. The question now, as before the Act, is one simply of intention on the whole of the Will ; and a mere charge of debts upon the real estate, or a mere devise of the real estate subject to the testator's debts without any trust, is sufficient in the event of the personal estate proving inadequate to pay both debts and legacies to entitle the legatees to come upon the real estate so far as the personalty has been applied in payment of debts (*y*). Moreover, although Part I. of the Land Transfer Act, 1897, has rendered unnecessary an express charge of debts on real estate, it has not affected the application of the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts and the personalty is exhausted in paying debts (*z*).

5. General pecuniary legacies *pro ratâ* (*a*). (5) General pecuniary legacies.

As to demonstrative legacies, if the fund provided for their payment is insufficient, the balance is to be treated as a general legacy to be paid *pari passu* out of the general assets (*b*).

6. Specific and residuary devises and specific legacies *pro ratâ* (*c*). (6) Real estate specifically devised and specific legacies.

A lapsed share of real estate is applicable for payment of debts in the same order as the devised estates and not till after real estate descended (*d*). So also when a life interest Lapsed share of real estate which descends.

(*x*) Haslewood *v.* Pope, (1734) 3 P. Wms. 323 ; Surtees *v.* Parkin, (1854) 19 Beav. 406.

(*y*) Richard *v.* Barrett, (1857) 3 K. & J. 289.

(*z*) *Re* Kempster, [1906] 1 Ch. 446 *Re* Balls, [1909] 1 Ch. 791.

(*a*) Farquharson *v.* Floyer, (1876) 3 C. D. 109 ; *Re* Stokes, (1892) 67 L. T. (N. S.) 223 ; *Re* Salt, [1895] 2 Ch. 203 ; *Re* Roberts, [1902] 2 Ch. 834.

(*b*) Sellon *v.* Watts, (1861) 9 W. R. 847.

(*c*) Manning *v.* Spooner, (1796) 3 Ves. 117.

(*d*) Wood *v.* Ordish, (1855) 3 Sm. & G. 125.

properly given by a Will becomes under the terms of the Will subsequently forfeited, and then by rule of law descends to the testator's heir, the heir takes exactly that which the tenant for life would have taken if his life estate had not been forfeited (*e*).

Lands escheated.

Land not charged with payment of debts which escheat to the lord for want of heirs are assets to pay debts under 3 & 4 Will. 4, c. 104, although the lord is neither heir nor devisee, but it seems to be doubtful whether the same are to be applied in priority to or *pari passu* with specifically devised lands (*f*).

Residuary devise is specific.

A residuary devise of real estate is still specific notwithstanding s. 24 of the Wills Act. Therefore, where the personal estate is insufficient for the payment of debts, the specific devisees must contribute rateably with the residuary devisee (*g*).

Mode of valuing real estate charged with portions.

As between real estate devised charged with portions and specifically bequeathed personal estate, the former must contribute in proportion to its full value, and not in proportion to its value less the amount of the portions (*h*).

Mode of valuing residuary real estate charged with legacies.

So also where pecuniary legacies are charged upon the residuary real estate (under the doctrine of *Greville* v. *Browne* (*i*)), and the personal estate is insufficient for payment of debts in full, the pecuniary legacies are not liable to contribute to the debts, but the residuary real estate must contribute rateably with the specific devisees and legatees, according to its full value without deducting the amount of the pecuniary legacies (*k*).

Distinction between annuities issuing out of land and legacies payable out of the proceeds of sale of land.

The gift of a rent charge or annuity issuing out of land being an interest in the land itself is necessarily specific, but general legacies do not become specific because they are payable out of the proceeds of real estate in case of a deficiency of

(*e*) Hurst *v.* Hurst, (1884) 28 C. D. 159.

(*f*) Evans *v.* Brown, (1842) 5 Beav. 114.

(*g*) Lancefield *v.* Iggulden, (1874) L. R. 10 Ch. 136.

(*h*) *Re* Saunders-Davies, (1887) 34 C. D. 482.

(*i*) (1859) 7 H. L. C. 689.

(*k*) *Re* Bawden, [1894] 1 Ch. 693.

personal estate. Consequently, annuities so given are entitled to priority over such legacies (*l*).

Effect of Locke King's Act.

Further, devisees of mortgaged property are not entitled to compete with pecuniary legatees. After *Lutkins* v. *Leigh* (*m*) and before Locke King's Act (*n*) it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the Will entitled as against a residuary legatee to have the mortgage debt paid off out of residue ; and if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held on the doctrine of marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty. The effect of Locke King's Act was to benefit the residuary legatee and not to prejudice any rights the pecuniary legatee had in equity (*o*).

Provisions of 40 & 41 Vict. c. 34.

The Act 40 & 41 Vict. c. 34, which amended the real Estate Charges Acts, 1854 (17 & 18 Vict. c. 113, known as Locke King's Act) and 1867 (30 & 31 Vict. c. 69) (*p*) provides that as to a testator or intestate dying after the 31st December, 1877, seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money, the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall within the meaning of the previous Acts have signified a contrary intention ; and such contrary intention shall not be deemed to be signified by a charge of or

(*l*) Creed *v.* Creed, (1844) 11 Cl. & F. 491.

(*m*) (1734) Cas. t. Tal. 53.

(*n*) 17 & 18 Vict. c. 113.

(*o*) *Re* Smith, [1899] 1 Ch. 365. As to marshalling assets in favour of devisees of rent-charges to be reserved out of mortgaged land as against the general personal estate, see *Re* Fry, [1912] 2 Ch. 86.

(*p*) With regard to these Acts and the cases thereon, see Williams (10th ed.) 1324 *et seq.*, also *Re* Bowerman, [1908] 2 Ch. 340.

direction for payment of debts upon or out of residuary real and personal estate or residuary real estate (*q*).

The Act is applicable to and includes every equitable charge of whatever nature or description, including a charge created by statute, such as a charge for estate duty under the Finance Act, 1894 (*r*). But the Act does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership, when at his death the partnership assets are sufficient to answer all the debts of the partnership ; since the only right of the executors is to have paid over to them the testator's share of the surplus assets of the partnership and no dispute arises as between the different persons claiming through or under the deceased (*s*).

A direction that a mortgage debt on Whiteacre shall be paid out of the proceeds of sale of Blackacre exonerates Whiteacre to the extent of those proceeds, but does not indicate a general contrary or other intention within the Act of 1854 so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency (*t*).

Effect of contrary intention being expressed.

Where by reason of the testator having expressed a contrary intention the application of Locke King's Act is excluded, then the old law applies, and the heir or devisee is entitled, subject to any other direction express or implied contained in the Will, to have the debt discharged out of the residuary personalty, whether there was a covenant or bond accompanying the mortgage or not. But this rule did not apply where the debt was not the debt of the ancestor or testator, but the estate came to him charged with the debt, unless subsequently the ancestor or testator had made the debt his own. An ancestor or testator who on a transfer of mortgage entered into a personal covenant to pay the mortgage debt (*u*), or who on a sale of part of an estate covenanted

(*q*) As to contrary intention, see *Re* Valpy, [1906] 1 Ch. 531.
(*r*) *Re* Bowerman, [1908] 2 Ch. 340.
(*s*) *Re* Ritson, 1899] 1 Ch. 128.
(*t*) *Re* Birch, [1909] 1 Ch. 787.
(*u*) Waring *v.* Ward, (1802) 7 Ves. 336.

with the purchaser for indemnity (*x*), did not thereby make the mortgage debt his own, but if on a transfer of mortgage the advance was made by the transferee subject to a proviso for redemption altogether different from the prior equity of redemption, it was held to be a new mortgage (*y*).

Right of heir or devisee to have contract for erection of buildings completed.

Where a person has entered into a contract for the erection of buildings on land belonging to him, and dies before the buildings are completed, the heir-at-law or devisee as the case may be is entitled to have the buildings completed out of the general personal estate (*z*).

Right of specific legatee of chattels to have legacy redeemed :

A specific legatee is entitled to have his legacy redeemed from charges created by the testator (as distinguished from charges incidental to the property) at the expense of the testator's general estate, or, if the property is not redeemed, to have compensation out of the general estate to the amount of the legacy (*a*).

so legatee of mortgaged share of proceeds of sale of real estate,

The same principle applies to a mortgaged share of proceeds of sale of real estate directed to be converted, since it comes to the mortgagor as personal estate, and is not an interest in land within the meaning of Locke King's Act (*b*).

or of debentures of a company.

The same remark applies to debentures issued by a company (*c*).

In *Re Butler* (*d*) it was held that although the general law is that the legatee of a chattel, or other personal estate, takes with it the privilege of having any debt charged on it paid out of the personal estate, yet where the general personal estate of a testator not specifically bequeathed is insufficient for

(*x*) Barham *v.* Earl of Thanet, (1834) 3 My. & K. 607.

(*y*) Barham *v.* Earl of Thanet, (1834) 3 My. & K. 607; and see further on this subject, Coote on Mortgages (7th ed.), p. 775, and Watson's Comp. of Equity (2nd ed.), p. 1413.

(*z*) Cooper *v.* Jarman, (1866) L. R. 3 Eq. 98; *Re* Day, [1898] 2 Ch. 510; *Re Hughes*, (1913) W. N. 242.

(*a*) Bothamley *v.* Sherson, (1875) L. R. 20 Eq. 304. Colonial death duty though deemed to be a debt by the local law, in the case of a specific devise or bequest of the property subject thereto, falls on that property notwithstanding a testamentary direction to pay debts out of residue : *Re* Brewster, [1908] 2 Ch. 365; *Re* De Sommery, [1912] 2 Ch. 622 (foreign property).

(*b*) Lewis *v.* Lewis, (1871) L. R. 13 Eq. 218.

(*c*) *Re* Chantrell, (1907) W. N. 213.

(*d*) [1894] 3 Ch. 250.

payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance ; and a general direction in the Will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the devisees of real estate (*e*).

Date of valuation for purpose of compensation.

Where a specific legacy of shares in a company has in the first instance been resorted to for payment of debts, subsequently, in compensating the legatee out of the residuary estate, the value of the shares must be ascertained at the date when the legatee was entitled to the right to the enjoyment, which in the case of a contingent legacy on attaining twenty-one years of age would be the date when he attained that age (*f*).

(7) Real and personal property appointed by Will.

7. Real and personal property which the testator has power to appoint, and which he has appointed, by his Will.

Personal estate, or real estate appointed by a testator, is to be applied only in aid of the assets which are really the property of the testator (*g*). These are not general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted (*h*). But where a power of appointment is exercised by a general bequest in a Will the property appointed is included in and passes by the bequest according to the terms of the Will, and not as if a separate execution of the power were read into the Will. The property is therefore *not* necessarily postponed, as a fund liable for payment of the testator's debts, to other assets of the testator (*i*).

Both real and personal estate subject to general powers of appointment become assets for the payment of the appointor's debts, if the power is actually exercised in favour of

(*e*) *Re* Butler, [1894] 3 Ch. 250.

(*f*) *Re* Broadwood, [1911] 1 Ch. 277.

(*g*) Fleming *v.* Buchanan, (1853) 3 D. M. & G. 976.

(*h*) Per Ld. Lindley, in Beyfus *v.* Lawley, [1903] A. C. 411, affirming *Re* Lawley, [1902] 2 Ch. 799, and approving Fleming *v.* Buchanan, *ubi sup.*

(*i*) Williams *v.* Withams, [1900] 1 Ch. 152.

volunteers ; and it makes no difference whether the power is exercised by deed or by Will only (*k*). Voluntary conveyances are void as against creditors under 13 Eliz. c. 5, if the settlor was indebted at the time of making such conveyance.

What sufficient to show intention to exercise power.

An appointment of an executor without more would not, it would seem, under s. 27 of the Wills Act make the fund assets. But where a testator, with a general power of appointment, makes a Will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient ; and where a testator with such a power gives legacies and appoints an executor, he must be taken as exercising the power to the extent to which the fund subject to it is required to make the legacies effective (*l*).

Appointment by married woman.

Sect. 4 of the Married Women's Property Act, 1882, provides that the execution of a general power by Will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act (*m*). Prior to this Act it was held that s. 27 of the Wills Act applied to married women having testamentary powers of appointment exercisable during coverture (*n*).

When appointed fund assets for all purposes.

Although the law is now settled that where the donee of a general power of appointment over a fund of personalty makes an appointment of the fund by Will and appoints an executor, the executor is entitled to receive the appointed fund (*o*), and his appointee can take nothing until after his creditors have been paid (*p*), yet whether the testator intended to make the fund his own so as to take it for all purposes away from the persons entitled in default of appoint-

(*k*) Farwell on Powers (2nd ed.), p. 254, referring to Fleming *v.* Buchanan, *ubi sup.*, and Williams *v.* Lomas, (1852) 16 Beav. 1. As to the distinction between power and property, see *Ex parte* Gilchrist, (1886) 17 Q. B. D. 521, 530 ; Goatley *v.* Jones, [1909] 1 Ch. 557.

(*l*) *Re* Davies' Trusts, (1871) L. R. 13 Eq. 163, 166 ; *Re* Seabrook, [1911] 1 Ch. 151.

(*m*) And see *ante*, p. 15.

(*n*) Bernard *v.* Minshull, (1859) Johns. 276.

(*o*) *Re* Hoskin's Trusts, (1877) 6 C. D. 281.

(*p*) Thompson *v.* Towne, (1694) 2 Vern. 319.

ment is a question of intention. The bare exercise of the power and the appointment of executor without more is not sufficient evidence of such an intention (*q*). Nor is an express direction to pay debts coupled with the appointment of an executor (*r*). And in general, where the appointment is for a limited purpose or a purpose which fails, it would seem, on principle, that there should be no appointment at all, or none beyond the limited purpose (*s*). The circumstance that a testator expressly distinguishes between the appointed fund and his own property may assist the case of those claiming in default of appointment (*t*). If, however, there is not only the appointment of an executor, but also a dealing with the testator's own property and with the fund over which he had a power of appointment as one mass, then the appointed property is made his own property for all purposes (*u*).

Paraphernalia.

8. The wife's paraphernalia (*x*).

(*q*) *Re* Thurston, (1886) 32 C. D. 508.

(*r*) Laing *v.* Cowan, (1857) 24 Beav. 112.

(*s*) *Re* Davies' Trusts, (1871) L. R 13 Eq. 163.

(*t*) *Re* Boyd, [1897] 2 Ch. 232.

(*u*) Coxen *v.* Rowland, [1894] 1 Ch. 406 ; *Re* Pryce, [1911] 2 Ch. 286, 295.

(*x*) Snelson *v.* Corbet, (1746) 3 Atk. 369 ; Aldrich *v.* Cooper, (1803) 8 Ves. 382, 397.

CHAPTER XXXIX.

OF THE RESIDUE.

SECT. 1.—*Title to Residue.*

THE substantial title of the residuary legatee or next-of-kin to the residue is complete at the death of the testator or intestate. The rule of law, or the rule laid down by the statute, which requires the conversion of an estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division (*a*).

Substantial title complete at death of testator or intestate.

The Statute of Distributions must be looked at as in substance nothing more than a Will made by the legislature for the intestate, and his next-of-kin stand with regard to his personal estate in the same condition as does a residuary legatee under a Will (*b*).

Next-of-kin under the statute stand in same position as residuary legatees under Will.

A residuary legatee has a right to insist that, in the course of the first year after the testator's death the executor shall, if it be possible, pay the debts, legacies, and funeral and testamentary expenses, so that the clear residue may be ascertained and paid over to him, or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is the duty of the executor to sell the personal estate, or at all events so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses, and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date that the right of those entitled to life interests in it commences, and, therefore, when eventually the whole estate is realised, it becomes necessary to ascertain retrospectively

Residue to be ascertained within first year.

Rights of persons having life interests ascertained at the end of a year.

(*a*) Cooper *v.* Cooper, (1874) L. R. 7 H. L. 53; and see Blake *v.* Bayne, [1908] A. C. 371.

(*b*) Cooper *v.* Cooper, *ubi sup.*

what was the residue at the end of the year, attributing a due proportion of the sum realised after the end of the year to capital and a due proportion to interest (*c*).

No distribution under the statute till the end of a year.

Sect. 8 of the Statute of Distributions (22 & 23 Car. II. c. 10) enacts to the end that a due regard be had to creditors, that no distribution of the goods of any person dying intestate be made till one year after the intestate's death.

Residuary legatees or next-of-kin may agree to divide in specie.

When there are several residuary legatees, or several entitled under the statute, when the residue has been ascertained, they may agree between themselves to take any portion of the estate in specie, or an appropriation may be made of particular portions in satisfaction of any share.

One of several cannot claim adversely any part in specie.

The only right they can enforce adversely is to have the administration completed and the residuary estate ascertained and realised either wholly or so far as may be necessary. One of several cannot claim any part of the estate in specie, but only to a proportion of the proceeds after realisation (*d*).

Land Transfer Act, 1897.

The Land Transfer Act, 1897, provides as follows :—

Sect. 2 (3), as to real estate.

Sect. 2 (3). "In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs and expenses, and with the same incidents, as if it were personal estate ; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts or legacies, or the liability of real estate to be charged with the payment of legacies."

Sect. 3 makes provision for the personal representative's assent to any devise, and for the conveyance of land to any person entitled thereto as heir, devisee, or otherwise (*e*).

Sect. 4 (1), power to appropriate residuary estate.

Sect. 4 (1) provides that "The personal representatives

(*c*) Wightwick *v.* Lord, (1857) 6 H. L. C. 217, 226. As to adjustment of rights of tenant for life, see *post*, p. 574.

(*d*) Ld. Sudeley *v.* Att.-Gen., [1896] 1 Q. B. 354 ; [1897] A. C. 11, 21.

(*e*) See *ante*, p. 539.

of a deceased person may, in the absence of any express provision to the contrary contained in the Will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court."

This section applies to all residuary estate whether real or personal (*f*).

Power to appropriate apart from the statute.

Where there is a trust for sale and conversion this section seems to have made no difference to that which was the power before the Act. The principle being that where the trustee is directed to convert and to pay the beneficiary money, it is competent for him to agree to sell to the beneficiary the property against the money which otherwise he would have to pay to him ; and the same principle would apply whenever the circumstances are such that the executor would be bound to turn assets of the testator into money and apply it to the legacy in the ordinary course of administration apart from any trust for sale and conversion (*g*). In *Re Richardson* (*h*) there was no trust to convert, but simply a gift of the residuary estate to certain persons in shares, and it was held that the executors might appropriate specific assets to a trust share of residue or transfer them to the

(*f*) *Re* Beverly, [1901] 1 Ch. 681.
(*g*) *Ibid.*
(*h*) [1896] 1 Ch. 512.

legatee of a share in advance of final division. The Act of 1897 may possibly apply to cases of this kind (*i*).

Sect. 2.—*Where Residue is settled.*

Rule in Howe *v.* Earl of Dartmouth, as to sale and investment where residuary personal estate is to be enjoyed by several in succession.

The rule as laid down by Lord Eldon in *Howe* v. *Earl of Dartmouth* (*k*) and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering* v. *Pickering* (*l*), amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous (*m*).

Rule not applicable where intention indicated that property should be enjoyed in specie.

But the rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it (*n*). The rule must be applied unless upon the fair construction of the Will you find a sufficient indication of intention that it is not to be applied; the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case (*o*).

(*i*) See *Re* Beverly, [1901] 1 Ch. 681, per Buckley, J., at p. 687.
(*k*) (1802) 7 Ves. 137.
(*l*) (1839) 4 My. & Cr. 289.
(*m*) Macdonald *v.* Irvine, (1878) 8 C. D. 101, 112.
(*n*) *Ibid.*
(*o*) *Ibid.*, at p. 124; and see *Re* Pitcairn, [1896] 2 Ch. 199, 205; *Re* Game, [1897] 1 Ch. 881 *Re* Wareham, [1912] 2 Ch. 312.

Effect of express power to retain.

It would seem that the rule does not apply where the Will contains a power to retain investments belonging to the testator at his death, since the obligation to convert and the power to retain at discretion are inconsistent one with the other. But in this respect a distinction has been drawn in many cases between wasting and hazardous securities. In *Re Sheldon* (*p*) where the securities retained were not of a wasting nature it was held that the tenant for life was entitled to receive the whole income. This was followed in *Re Bates* (*q*) where the securities retained were of a hazardous character, but not wasting securities; and again in *Re Wilson* (*r*) where trustees under such a power retained many securities not specifically authorised but no wasting securities. In *Porter* v. *Baddeley* (*s*) it was held that the application of the rule was not excluded by such power to retain in the case of long annuities being of a wasting character. But in *Gray* v. *Siggers* (*t*) being a bequest of short leaseholds it was held that the power to retain took the case out of the general rule as to conversion of perishable property. This latter case was followed in *Re Nicholson* (*u*) where it was held that there is no distinction for the purposes of the application of the rule between unauthorised securities of a wasting and those of a permanent nature.

Where trustees have a discretionary power to retain investments, which otherwise in accordance with the rule in *Howe* v. *Earl of Dartmouth* ought to be sold, in order to exclude the rule they must properly exercise the discretion to retain. In the absence of express power trustees cannot exercise a power of management merely to benefit one beneficiary at the expense of another. Further, if by an oversight the discretionary power is not exercised at all, as if the question of converting a reversionary interest in property to the income of which the tenant for life was herself entitled under another Will, never crossed their minds, or if the

(*p*) (1888) 39 C. D. 50.
(*q*) [1907] 1 Ch. 22.
(*r*) [1907] 1 Ch. 394.
(*s*) (1877) 5 C. D. 542.
(*t*) (1880) 15 C. D. 75.
(*u*) [1909] 2 Ch. 111.

trustees, if they had thought of it, could not have properly refused to convert the reversionary interest, then the property ought to have been sold in accordance with the rule (*x*).

Exclusion of rule where Will fixes time of sale or power to sell is left to discretion of others.

When the time of sale is fixed by the Will, either by reference to a given number of years after the testator's death, or by the falling in of a life, or anything of that kind, or when it is left to the discretion of someone else to say when the sale is to take place, the testator himself having by his Will provided for the sale, there is no rule of the Court which requires that the sale should be made in a different way or under different circumstances from those indicated by the Will. Consequently in *Re Pitcairn* (*y*), where part of the testator's property consisted of the reversion, expectant on the death of his mother, of funds settled on her marriage of which she was tenant for life, and by his Will he gave all his property to trustees upon trust for his mother for life, with remainder to other persons with a power to the trustees, if and when they should consider it expedient, to sell and dispose of all or any part of his estate, it was held that the discretionary power of sale given by the Will to the trustees was inconsistent with any intention of the testator that the Court should realise the reversionary property and excluded the application of the rule in *Howe* v. *Earl of Dartmouth*, and that after the death of the mother her personal representatives were not entitled to any part of the proceeds of the reversion.

Rule in Allhusen *v.* Whittell, as to adjusting rights of tenant for life of residue.

Every tenant for life of residue is entitled to the income (*z*) of all such part of the residue as is not required for the payment of debts and which is found to be in a proper state of investment. He is entitled to the income of that property from the death of the testator. He is not entitled to have the income arising from what is wanted for the payment of debts, because that never becomes residue in any way what-

(*x*) Rowlls *v.* Bebb, [1900] 2 Ch. 107.

(*y*) [1896] 2 Ch. 199.

(*z*) Under the expression "income arising from my estate" profits of the testator's business earned since the death are included: *Re* Elford, [1910] 1 Ch. 814.

ever. Therefore, although the executors will be justified, as between themselves and the whole body of persons interested in the estate, in dealing with it as they think best in the administration, yet for the purpose of adjusting the rights between the parties the executors will be taken by the Court as having applied in payment of debts, legacies and other charges during the year such a portion of the fund as together with the income of that portion for one year was necessary for the purpose (*a*).

This rule is not affected by the circumstance that the debts and legacies have been paid before the expiration of a year from the testator's death, and that the income from the continuance of the estate in the business carried on by the testator has greatly exceeded 5 per cent., so that the rule operates unfavourably to the tenant for life (*b*).

Principle applied where resort is had to proceeds of real estate on deficiency of personal estate.

Where the personal estate is insufficient, and resort is had to the proceeds of real estate to pay debts, in adjusting the rights of the tenant for life and remainderman, the principle laid down in *Allhusen* v. *Whittell* (*c*) applies, but the tenant for life of the real estate must, as well during the first year after the testator's death as subsequently, keep down all the interest upon all the debts bearing interest and which have been ascertained to be a charge upon such estate (*d*).

Application of principle where debt consists of annuity covenanted to be paid by testator

Where the debt consists of an annuity covenanted to be paid by the testator in his lifetime, there is a difference of judicial decision how the principle of *Allhusen* v. *Whittell* should be applied. In *Yates* v. *Yates* (*e*) and *Re Dawson* (*f*) it was held that the successive instalments of the annuities must be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death. But in *Re Muffett* (*g*), *Re Harrison* (*h*),

(*a*) Allhusen *v.* Whittell, (1867) L. R. 4 Eq. 295.

(*b*) Lambert *v.* Lambert, (1873) L. R. 16 Eq. 320.

(*c*) *Ubi sup.*

(*d*) Marshall *v.* Crowther, (1874) 2 C. D. 199.

(*e*) (1860) 28 Beav. 637, Romilly, M.R.

(*f*) [1906] 2 Ch. 211, Swinfen Eady, J.

(*g*) (1888) 39 C. D. 534.

(*h*) (1889) 43 C. D. 55.

Re Bacon (*i*), and *Re Henry* (*k*), the principle applied was to treat the successive instalments as contingent debts which as they become payable must be paid out of capital by sale or mortgage of a sufficient part of the settled property. These cases were considered by Swinfen Eady, J., in *Re Perkins* (*l*), and he held that the rule of *Allhusen* v. *Whittell* should be applied as each payment accrues, by calculating what sum with 3 per cent. simple interest to the day of payment would have met the particular instalment, and charging that sum to capital and the balance to income.

Effect of retaining property unconverted for convenience of estate.

Where income-producing property directed by Will to be converted is retained for a time unconverted for the benefit of the estate, it is the practice of the Court to put a value on the property and to allow the tenant for life out of the income actually produced such an annual sum as in the opinion of the Court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received if the property had been sold and the proceeds properly invested (*m*). In this respect there is no distinction whether the testator either leaves the Court to act under the rule in *Howe* v. *Earl of Dartmouth* or directs conversion himself (*n*).

In *Brown* v. *Gellatly* (*o*) it was held that tenants for life were not entitled to the earnings of ships as income, but only to interest at 4 per cent. on the value of the ships from the testator's death, and as regards unauthorised investments only to an income from the testator's death equal to dividends of Consols which would have been produced by sale and investment in Consols. In such cases 3 per cent. should now take the place of 4 per cent (*p*).

Where the estate consisted largely of unauthorised

(*i*) (1893) 62 L. J. Ch. 445.

(*k*) [1907] 1 Ch. 30.

(*l*) [1907] 2 Ch. 596; followed in *Re* Poyser, [1910] 2 Ch. 444, but interest calculated at 3½ per cent.

(*m*) Brown *v.* Gellatly, (1867) L. R. 2 Ch. 751; Wentworth *v.* Wentworth, [1900] A. C. 171; *Re* Woods, [1904] 2 Ch. 4.

(*n*) *Re* Woods, *ubi sup.*, at p. 15.

(*o*) *Ubi sup.*

(*p*) *Re* Woods, *ubi sup.*, followed in *Re* Chaytor, [1905] 1 Ch. 233.

securities, some of which were non-dividend paying and some paid more and some less than 4 per cent. interest, in the absence of a direction as to income pending the conversion under a discretionary power to postpone the tenant for life was held entitled as from the death to interest at 4 per cent. on the aggregate value of all the unauthorised securities and not on the capital value of each separately, and that if the income of the estate were insufficient in any year to pay 4 per cent., any over payment must be adjusted out of subsequent income (*q*).

Securities to be valued as at the end of a year.

The securities must be valued as at the time when they ought to have been converted, that is to say, immediately after the testator's death, if he has so directed, or at the expiration of a year from his death if he has given no direction (*r*).

Income beyond what tenant for life entitled to, to be invested as capital.

The income produced over and above what the tenant for life is entitled to must be invested as capital and the tenant for life is entitled to the income of the invested fund (*s*).

Income of investment improperly made.

There is a distinction between the non-conversion of existing investments and the putting into an unauthorised investment a fund not already invested. In the latter case, assuming the capital remains intact, the tenant for life may claim any money received *quâ* interest and no part will be treated as an accretion to capital (*t*).

Rule in Dimes *v.* Scott where executors are directed to convert and invest without any discretion.

The rule laid down by Lord Lyndhurst in *Dimes* v. *Scott* (*u*) is that where by the language of the Will the executors are expressly directed to convert the personal estate into money and to invest in government or real securities and it is not left to their discretion, the tenant for life is entitled to receive only the dividends which the stock if purchased one year after the testator's death would have produced, and the tenant for life is not entitled to the whole of the larger income produced by the investment retained by the executor without authority. During the first year after

(*q*) *Re* Owen, [1912] 1 Ch. 519.
(*r*) *Re* Woods, *ubi sup.*
(*s*) *Ibid.*
(*t*) Stroud *v.* Gwyer, (1860) 28 Beav. 130; *Re* Appleby, [1903] 1 Ch. 565, 566; Slade *v.* Chaine, [1908] 1 Ch. 522; *Re* Hoyles, [1912] 1 Ch. 67.
(*u*) (1827) 4 Russ. 195.

the testator's death the tenant for life is entitled, not to the interest on the unauthorised investment, but to the dividends on so much 3 per cent. stock as would have been produced by the conversion of the property at the end of the year.

Effect of express trust for conversion with power to retain.

Where there is an express trust for conversion and a power to retain securities of every kind, authorised and unauthorised, and there is no express gift of the income pending conversion, the general rule is that the tenant for life is entitled to the income of authorised securities, but not entitled to the income of unauthorised securities. In the latter case he is only entitled to interest, which is now fixed at the rate of 3 per cent. on their value at the testator's death. This rule applies to unauthorised securities whether of a wasting character or not (*x*).

Where there is a trust for conversion with a power to retain investments existing at the date of the Will, in the absence of unanimity between the trustees as to the retention of investments, the trust for sale operates and must be carried into effect (*y*).

Rule in *Re* Earl of Chesterfield's Trusts, as to apportioning between capital and income outstanding personal estate on falling into possession.

The rule established in *Re Earl of Chesterfield's Trusts* (*z*) is that where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with

(*x*) *Re* Chaytor, [1905] 1 Ch. 233.
(*y*) *Re* Hilton, [1909] 2 Ch. 548.
(*z*) (1883) 24 C. D. 643.

yearly rests, and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income. This rule extends to property which is not producing income, such as a reversionary interest, unless the trustees have justifiably postponed conversion (*a*).

Interest pending conversion.

In cases of this kind the interest is now calculated at the rate of 3 per cent. and not 4 per cent. (*b*).

Until sale of real estate tenant for life entitled to rents.

In the case of a simple devise of real estate in trust for sale, until sale the tenant for life of the proceeds is entitled to the rents and profits only, provided the sale is not improperly postponed (*c*); and the rule is the same where real and personal estate are devised and bequeathed together and the proceeds are to be held as one fund (*d*).

Deficient mortgage securities.

Under similar trusts as in *Re Earl of Chesterfield's Trusts*, part of the assets included several mortgage debts, the interest on which was at the testator's death in arrear and the testator was in receipt of the rents and the trustees had continued in such receipt. The securities being deficient, it was held that the trustees must first apply each instalment of rent received since the testator's death from each mortgaged property in satisfaction of the arrears of interest which at the testator's death were due in respect of his mortgage, being a debt due to the testator and part of the capital of the estate, and then distribute the balance as income up to, but not exceeding the interest accrued since the testator's death on the mortgage, and apply any excess as capital (*e*).

Sect. 3.—*Of what a Residuary Bequest consists.*

Meaning of residuary legatee.

The term "residuary legatee" *primâ facie* means the person taking what the law calls the residue of the personal

(*a*) Rowlls *v.* Bebb, [1900] 2 Ch. 107.

(*b*) *Ibid.*; and see *Re* Goodenough, [1895] 2 Ch. 537.

(*c*) Casamajor *v.* Strode, (1809) 19 Ves. 390 n; Hope *v.* D'Hédouville, [1893] 2 Ch. 361; *Re* Searle, [1900] 2 Ch. 829; *Re* Earl of Darnley, [1907] 1 Ch. 159.

(*d*) *Re* Earl of Darnley, *ubi sup.*; *Re* Oliver, [1908] 2 Ch. 74.

(*e*) *Re* Coaks, [1911] 1 Ch. 171.

estate; but it is a term which must be fashioned and moulded by the context (*f*). Whether the testator had real estate or not at the date of his Will is material to enable the Court on the construction of the Will to determine whether the real estate did or did not pass to the person described as "residuary legatee" (*g*).

What passes under residue.

It had been long settled prior to the Wills Act, 1837, that a residuary bequest of personal estate (for it was otherwise as to real estate) carried, not only everything not disposed of, but everything that in the event turns out not to be disposed of, and that a presumption arises for the residuary legatee against everyone except the particular legatee (*h*). In order to exclude from a general residuary gift a particular property belonging to the testator and not otherwise disposed of by the Will, it is necessary to find a plain and unequivocal intention on the part of the testator to exclude it (*i*). For instance, if the testator excepts specific property from the general gift, and makes no disposition by Will of the excepted property, the excepted property passes as on an intestacy (*k*).

Effect of Wills Act: Sect. 24. Will speaks from death of testator.

By the Wills Act, 1837 (s. 24), every Will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the Will. And further (s. 25), unless a contrary intention shall appear a residuary devise shall include such real estate as shall be comprised in any devise which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise being incapable of taking effect.

Sect. 25. Residuary devise includes any lapse or void devise.

Sect. 27. General devise or

By s. 27 of the Wills Act a general devise of the real estate

(*f*) Singleton *v.* Tomlinson, (1878) 3 App. Cas. 404, 417, per Ld. Cairns; *Re* Gibbs, [1907] 1 Ch. 465.

(*g*) *Re* Methuen & Blore's Contract, (1881) 16 C. D. 696; *Re* Morris, (1894) W. N. 85; *Re* Gibbs, *ubi sup.*, 54; As to what expressions are sufficient to constitute a residuary legacy see Williams (10th ed.) 1195 *et seq.*

(*h*) Cambridge *v.* Rous, (1802) 8 Ves. 12, 25.

(*i*) *Re* Bagot, [1893] 3 Ch. 348.

(*k*) *Re* Fraser, [1904] 1 Ch. 111, 726.

or a general bequest of the personal estate of the testator shall be construed, as the case may be, to include any real estate or any personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the Will. Where, however, the power to appoint is by deed only a Will will not do. Moreover the Will must answer to the description given in the power, except as regards the mode of execution provided by sect. 10 of the Act, which cannot be interfered with. So that where the instrument creating the power provides that an appointment to be effectual shall make express reference to the power, an appointment not making any reference to the power is ineffectual (*l*) ; but a devise or bequest of real or personal property " over which I shall have any power of disposition by Will " is a sufficient reference to execute the power (*m*).

bequest includes property over which testator had general power of appointment

Sect. 27 does not apply to a power which is not general in regard to its objects, as such a power is not equivalent to ownership (*n*). And a power to appoint to any person except an individual named (unless possibly the excepted individual should be dead at the time the power is exercised) is not a power within s. 27 (*o*).

As to what is a general power within s. 27.

A power of revocation is not a power of appointment and will not be exercised by general words of bequest (*p*).

On the exercise of a general power, where the whole of the fund is not exhausted, questions arise whether there is a resulting trust in favour of the persons entitled in default of appointment under the instrument creating the power. This depends on whether the testator intended to make the fund part of his general estate. If the testator blends into one fund that which was his own property and that over which he

Fund not exhausted on exercise of power.

(*l*) Phillips *v.* Cayley, (1889) 43 C. D. 222 ; *Re* Davies, [1892] 3 Ch. 63.

(*m*) *Re* Lane, [1908] 2 Ch. 581.

(*n*) For the distinction between general and particular powers, see Farwell on Powers (2nd ed.) p. 286.

(*o*) *Re* Byron's Settlement, [1891] 3 Ch. 474 ; and see *Re* Wilkinson, [1910] 2 Ch. 216.

(*p*) Pomfret *v.* Perring, (1854) 5 D. M. & G. 775 ; *Re* Thursby's Settlement, [1910] 2 Ch. 181.

had a general power of appointment, the whole being made subject to his debts, funeral and testamentary expenses, and there is a failure of the trusts of the blended fund by reason of the death of the residuary legatee in the lifetime of the testator, there is no resulting trust, but the next-of-kin of the testator will be entitled (*q*).

Meaning of "residue" of a specific fund.

In dealing with specific funds the term "residue" may have the meaning of an aliquot part of the whole, since where a testator is dealing with an ascertained fund, or assumes that property will produce a given sum, it is indifferent whether, after he has given certain portions, he specifies the remainder by stating its amount, or by comprising it under the term of "residue" (*r*). But where the testator does not know the amount of the fund, or it is impossible to ascertain the amount until the fund is realised, the term "residue" has its ordinary meaning of what remains of the fund after satisfying the fixed payments thereout, and is consequently subject to decrease or increment (*s*).

Sect. 4.—*Of the Right of the Executor to Undisposed of Residue where Deceased has left no next-of-kin.*

Law prior to the Executors Act, 1830.

Prior to the Executors Act, 1830 (11 Geo. IV. & 1 Wm. IV. c. 40), it appears by the preamble to the Act that if a testator appointed executors and made no express disposition of the residue of his personal estate, the executors so appointed became by law entitled to the whole residue of such personal estate; and Courts of Equity had so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appeared to have been their testator's intention to exclude them from the beneficial interest therein, in which case they were held to be trustees for the person or persons (if any) who would be entitled to such

(*q*) *Re* Marten, [1902] 1 Ch. 314.

(*r*) Page *v.* Leapingwell, (1812) 18 Ves. 463; Elwes *v.* Causton, (1862) 30 Beav. 554.

(*s*) De Lisle *v.* Hodges, (1874) L. R. 17 Eq. 440; De Quetteville *v.* De Quetteville, (1905) 92 L. T. N. S. 758.

estate under the Statute of Distributions if the testator had died intestate (*t*).

Executors are now trustees for next-of-kin unless intended to take beneficially.

The Act provides (s. 1) that in such cases as to persons dying after the 1st September, 1830, the executors shall be deemed by Courts of Equity to be trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, unless it shall appear by the Will the persons appointed executors were intended to take such residue beneficially.

Application of the Act.

Sect. 2 of the Act provides "that nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled in cases where there is not any who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of."

The only object and effect of the Act was to deprive the executor of that position which he had *virtute officii*, under which anybody claiming to get the residue from him had to discover something on the face of the Will to show that he was intended to be a trustee and not to take beneficially. In any case in which by construction the Courts held before that Act that he was, though a named executor, really a trustee, the Act has no operation ; in other words, it only deals with property which the executor could claim to get and retain solely *virtute officii* (*u*).

Further, the Act only applies as between an executor and next-of-kin. It has no application where, there being no next-of-kin, the question is raised whether the Crown is entitled or the executor can retain the residue beneficially (*x*). In a case where there are no next-of-kin the executors are beneficially entitled to undisposed of residue, unless the Will shows a contrary intention.

Where Act does not apply, contrary intention may be inferred.

Such a contrary intention will not be inferred against the executor if being one of several executors a legacy is given to

(*t*) Williams (10th ed.) 1218.
(*u*) *Re* Roby, [1908] 1 Ch. 71, 77.
(*x*) *Re* Bacon's Will, (1886) 31 C. D. 460.

What is sufficient inference.

him alone (*y*), unless given to him for his care and trouble (*z*); but it will be inferred from the gift of a pecuniary legacy to a sole executor, or of equal pecuniary legacies to all the executors, but not from pecuniary legacies to them of unequal amounts. When once there is inequality, whether in respect of pecuniary legacies or in respect of specific legacies, then there is no presumption of a contrary intention sufficient to displace the legal title of the executors, and they will take the residue beneficially (*a*).

In the case of a sole executor there would seem to be no distinction whether the gift to him is a specific legacy or a pecuniary legacy as showing an intention that the executor should not take the residue (*b*).

So where personal property is bequeathed to the executors in trust they are precluded from claiming it for their own benefit, notwithstanding no trust is declared (*c*); and the presumption is against the executor whenever the character of trustee is plainly affixed to him, though not by express words (*d*); and if one of the executors is a trustee they are all trustees (*e*).

The executor is not entitled where the testator has ineffectually disposed of the residue, as if the gift of residue lapses or for any other reason fails (*f*).

Sect. 5.—*Of Distribution under the Statute.*

(1) *Of the rights of the Wife and Children and Representatives of Deceased Children.*

22 & 23 Car. II. c. 10, s. 5.

Sect. 5 of the Statute of Distributions (22 & 23 Car. II. c. 10) provides "That all Ordinaries, and every other person who by this Act is enabled to make distribution of the surplus-

(*y*) Buffar *v.* Bradford, (1741) 2 Atk. 222.

(*z*) Griffiths *v.* Hamilton, (1806) 12 Ves. 298, 308.

(*a*) *Re* Glukman, [1908] 1 Ch. 552; Att.-Gen. *v.* Jefferys, [1908] A. C. 411.

(*b*) Bowker *v.* Hunter, (1783) 1 Bro. C. C. 328, 331.

(*c*) Taylor *v.* Hogarth, (1844) 14 Sim. 8.

(*d*) Williams (10th ed.) 1220 and cases cited.

(*e*) Griffiths *v.* Hamilton, *ubi sup.*

(*f*) See Williams (10th ed.) 1222, and numerous cases cited.

age of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates in manner and form following ; that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made : and in case any child other than the heir-at-law who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid ; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated ; but the heir-at-law notwithstanding any land that he shall have by descent or otherwise from the intestate is to have an equal part in the distribution with the rest of the children without any consideration of the value of the land which he hath by descent or otherwise from the intestate " (*g*).

One-third share to wife and residue to children and representatives of deceased children.

Children (other than heir) to have equal shares having regard to advances.

1. In case none of the intestate's children be dead (*h*).

Children of intestate.

If the intestate leave only one child the intestate's widow, if any, will have a third part and the child two-thirds, or if there is no widow the child will have the whole.

(*g*) By the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw.VII. c. 47), s. 1, marriage contracted between a man and his deceased wife's sister either before or after the Act is to be deemed to have been a good civil contract and the children are legitimate and consequently entitled to share in the distribution of personal estate except so far as such personal estate is protected by s. 2 ; see *Re* Green, [1911] 2 Ch. 275.

(*h*) See Williams (10th ed.) 1237 *et seq.*

If the intestate leave several children, the intestate's widow, if any, will have a third part and the children two-thirds, or if there is no widow, the whole equally among them.

Brothers and sisters, whether of the whole blood or half-blood, are equally of kin to the intestate and take equally.

A posthumous child is also entitled.

Remoter issue of intestate.

2. In case any child of the intestate be dead leaving issue, such issue, in equal degree, represent *per stirpes* the deceased child *ad infinitum*.

And if all the intestate's children be dead, some or all leaving issue, it is now decided that such issue take *per stirpes* and not *per capita* (*i*).

It is only the widow of the intestate who is provided for by the statute ; the widow of a child or other issue of the intestate takes nothing under it (*k*).

Effect of s. 5 as to advancements by the intestate.

The provisions of s. 5 of the Statute of Distributions, directing advancements by the intestate in his lifetime by portions to his children to be brought into account, apply to an intestacy occasioned by a testamentary instrument becoming wholly inoperative by the death of the universal legatee and executrix in the lifetime of the testator, as well as to a case of actual intestacy occasioned by the non-existence of any testamentary instrument (*l*).

It was held prior to the passing of the Executors Act, 1830 (11 Geo. IV. & 1 Will. IV., c. 40), that this section applied only to the case of a total intestacy as regards the beneficial interest, or with something more, namely, an intestacy as to the appointment of an executor, and not where part only of the personal estate by reason of the lapse of a share bequeathed became distributable (*m*) ; and, in cases where that Act has no application (*n*), in applying the analogy of the

(*i*) *Re* Ross's Trusts, (1871) L. R. 13 Eq. 286 ; *Re* Natt, (1888) 37 C. D. 517 ; cf. as to collaterals, *post*, p. 589.

(*k*) Williams (10th ed.) 1238.

(*l*) *Re* Ford [1902] 1 Ch. 218 [1902] 2 Ch. 605.

(*m*) Cowper *v.* Scott, (1731) 3 P. Williams, 119, 125.

(*n*) See *ante*, p. 583.

Statute of Distributions to the case of a partial intestacy of the beneficial interest in undisposed-of residue, the rule of equity still is that advances made by the testator in his lifetime need not be brought into hotchpot (*o*).

Where, however, the Executors Act, 1830, applies, it may be, the analogy of the Statute of Distributions would be applied to its full extent, and advances made by the testator would have to be brought into hotchpot (*p*).

This section with regard to advances applies only to advances made by a father dying intestate, and does not apply to a mother, being a widow, advancing a child and dying intestate (*q*).

Issue of deceased child in no better position than their parent.

The issue of a deceased child stand in no better position than the deceased child they represent, and if such deceased child has been advanced by his father, who afterwards dies intestate, the issue of the dead child must bring into hotchpot what their father received by way of advancement, as he, if living, must have done (*r*).

What is an advancement.

Where a father makes a provision for a child on marriage, all the limitations in such settlement to the wife or husband and children of such child must be considered as part of that advancement; and it is not the child's estate for life only that ought to be valued and brought into hotchpot. The intent of the statute was to make all equal (*s*).

A provision which a father may make for his child by Will, in a case where the testator dies intestate as to part of his personal estate, shall not be brought into hotchpot. Such a provision, as shall be construed an advancement, must result from a complete act of the intestate in his lifetime, by which he divested himself of all property in the subject; though it is not requisite that it should take effect in possession till after his death (*t*).

(*o*) *Re* Roby, [1908] 1 Ch. 71.

(*p*) See *Re* Ford, *ubi sup.*, at p. 222; and the remarks of Fletcher Moulton, L.J., in *Re* Roby, *ubi sup.*, at p. 80.

(*q*) Holt *v.* Frederick, (1726) 2 P. Williams, 356.

(*r*) Proud *v.* Turner, (1729) 2 P. Williams, 560.

(*s*) Weyland *v.* Weyland, (1742) 2 Atk. 635.

(*t*) Williams (10th ed.) 1248.

The question as to what shall constitute an advancement has been considered in an early part of this work (*u*).

Valuation of advances.

It would seem the value of the advancement should be calculated as at the time it was made (*x*). Similarly, where appointed sums are to be brought into hotchpot under a common form clause in a marriage settlement, appointed stocks part of the fund should be valued as on the date of the death of the tenant for life, notwithstanding transfer to the appointee previously (*y*).

An advancement clause in a settlement applies to appointed as well as to unappointed shares (*z*).

Interest on advances.

Advances carry interest at 4 per cent. from the death of the intestate, or of the testator where directed by the Will to be brought into hotchpot (*a*), but no interest is calculated over the period ending with his death (*b*).

(2) *Of the Rights of the Wife, Father, Mother, and Next-of-kin in Default of Issue of the Intestate.*

Sect. 6. If no child or representatives of deceased child.

Sect. 6 of the Statute of Distributions provides that, "In case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next-of-kindred of the intestate who are in equal degree, and those who legally represent them."

Sect. 7. No representation among

Sect. 7 provides "That there be no representations admitted among collaterals after brothers' and sisters'

(*u*) See *ante*, p. 507, and see Williams (10th ed.) 1215 *et seq.*

(*x*) Kircudbright *v.* Kircudbright, (1802) 8 Ves. 51, 63; Hatfield *v.* Minet, (1878) 8 C. D. 136, 146; cf. *Re* Hargreaves, (1903) 88 L. T. (N. S.) 100, and *Re* Gilbert, (1908) W. N. 63, as to mode of adjustment between advanced and unadvanced children where a Will contains a hotchpot clause.

(*y*) *Re* Kelly's Settlement Trusts, [1910] 1 Ch. 78.

(*z*) *Re* Hodgson, [1913] 1 Ch. 34.

(*a*) *Re* Davy, [1908] 1 Ch. 61. As to the principle for ascertaining the income of the residuary estate pending distribution where interest is to be paid on advances, see *Re* Poyser, [1908] 1 Ch. 828.

(*b*) *Re* Rees, (1881) 17 C. D. 701; and see *Re* Willoughby, [1911] 2 Ch. 581.

children : and in case there be no wife, then all the said estate to be distributed equally to and amongst the children ; and in case there be no child, then to the next-of-kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

collaterals after brothers and sisters' children.
If no wife.
If no child.

The next-of-kin, referred to by the statute, are to be ascertained by the same rules of consanguinity as those which determine who are entitled to letters of administration (*c*).

Next-of-kin, how ascertained.

When a child dies intestate, without wife or issue, leaving a father, the latter is entitled, as the next-of-kin in the first degree, to the whole of the personal estate, exclusive of all others (*d*).

Rights of father.

If an intestate dies without issue, but leaving a widow and a father, then the personal estate shall go in moieties between the wife and father, subject to the widow's rights under the Intestates' Estates Act (*e*).

Rights of wife and father.

Although the children of a brother or sister stand in place of the parent in sharing with other brothers and sisters and take *per stirpes*, yet if no brother or sister is alive the representation *in loco parentis* is at an end and all take *per capita* (*f*).

As to representation to brothers and sisters.

There are no provisions in the statute as to hotchpot with reference to brothers and sisters (*g*).

Sect. 7 of Stat. 1 Jac. II. c. 17, enacts "that, if after the death of a father any of his children shall die intestate, without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

Rights of mother.

Where, after the death of his father, an intestate dies leaving no child, but a widow, a mother, and brothers and sisters, and children of a deceased brother, the widow takes one moiety and the mother shares the other moiety with the

(*c*) Williams (10th ed.) 1248 *et seq.*, and see *ante*, p. 114.

(*d*) *Ibid.*

(*e*) Williams (10th ed.) 1249, and see *post*, p. 591.

(*f*) Stanley *v.* Stanley, (1739) 1 Atk. 455 ; Lloyd *v.* Tench, (1750) 2 Ves. Sen. 213 ; cf. as to descendants, *ante*, p. 586.

(*g*) *Re* Gist, [1906] 1 Ch. 58 ; [1906] 2 Ch. 280.

intestate's brothers and sisters and the children of the deceased brother (*h*), and there being brothers and sisters living the children of the deceased brother take *per stirpes* by way of representation (*i*).

So where the intestate leaves a widow, a mother, and nephews and nieces children of a deceased brother, but no brother or sister, the widow takes one-half, the mother one-fourth, and the nephews and nieces one-fourth, but the representation is not to be carried beyond brothers' and sisters' children (*k*).

Half-blood take equally with the whole blood.

Brothers and sisters of the half-blood through the mother take equally with brothers and sisters of the whole blood (*l*).

Mother, when solely entitled.

If the intestate left neither wife nor child, nor father, and, there be neither brother nor sister, nor nephew or niece, the case is without the statute, and the whole of such intestate's effects shall devolve, as before the statute, to his mother (*m*).

Rights of grandfather and grandmother.

Brothers and sisters are preferred to a grandfather or grandmother, although they are all in the second degree of kindred, and this by reason of the law established previously to the statute (*n*).

Rights of a great-grandfather and great-grandmother and uncle and aunt.

But a grandfather or grandmother, being nearer kindred, is preferred to an uncle or aunt, and a great-grandfather or great-grandmother will take equally with an uncle or aunt, all being in the third degree (*o*).

Where the intestate leaves a grandfather by the father's side and a grandmother by the mother's side, his next-of-kin, they shall take in equal moieties, as being in equal degree ; for here dignity of blood is not material (*p*).

(*h*) Keylway *v.* Keylway, (1726) 2 P. Williams, 344.

(*i*) Lloyd *v.* Tench, (1750) 2 Ves. Sen., at p. 215.

(*k*) Stanley *v.* Stanley, (1739) 1 Atk. 455

(*l*) Jessopp *v.* Watson, (1833) 1 M. & K. 665.

(*m*) Williams (10th ed.) 1251.

(*n*) Evelyn *v.* Evelyn, (1754) 3 Atk. 762.

(*o*) Lloyd *v.* Tench, *ubi sup.*

(*p*) Moor *v.* Barham, (1723) referred to in Blackborough *v.* Davis, (1701) 1 P. Williams, 53.

Uncles and aunts and nephews and nieces, being of equal kindred, share equally (*q*) ; and as to the nephews and nieces no right of representation is allowed but must take *per capita* and not *per stirpes* (*r*).

Rights of nephews and nieces.

Affinity or relationship by marriage, except in the instance of the wife of the intestate, gives no title to a share of his property under the statute. Therefore, if the intestate had a son and daughter and they both die, the former leaving a wife and the latter a husband, upon the testator's death afterwards, such husband and wife have neither of them any claim on the estate (*s*).

Affinity or relationship by marriage gives no title to participate.

So also a mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the Statute of Distributions (*t*).

(3) *Of the Rights of Husband and Wife.*

Sect. 25 of the Statute of Frauds (29 Car. II. c. 3) provides that the Stat. 22 & 23 Car. II. c. 10 shall not be construed to extend to the estates of *feme coverts* that should die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates and recover and enjoy the same as they might have done before the making of the said Act.

Effect of 29 Car. II. c. 3, s. 25, as to rights of husband.

The Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), enacts as follows :—

Effect of Intestates' Estates Act, 1890, as to rights of wife.

Sect. 1. "The real and personal estates of every man who shall die intestate after the 1st September, 1890, leaving a widow but no issue, shall, in all cases where the net value of such real and personal estates shall not exceed £500, belong to his widow absolutely and exclusively."

Sect. 2. "Where the net value of the real and personal estates, in the preceding section mentioned, shall exceed the

(*q*) Lloyd *v.* Tench, (1750) 2 Ves. Sen. 213.

(*r*) Durant *v.* Prestwood, (1738) 1 Atk. 454.

(*s*) Williams (10th ed.) 1253.

(*t*) Williams (10th ed.) 1251.

sum of £500, the widow of such intestate shall be entitled to £500, part thereof absolutely and exclusively, and shall have a charge upon the whole of such real and personal estates for such £500, with interest thereon from the date of the death of the intestate at four per cent. per annum until payment."

Sect. 3. "As between the real and personal representatives of such intestate, such charge shall be borne and paid in proportion to the values of the real and personal estates respectively."

Sect. 4. "The provision for the widow, intended to be made by this Act, shall be in addition and without prejudice to her interest and share in the residue of the real and personal estates of such intestate remaining after payment of the sum of £500, in the same way as if such residue had been the whole of such intestate's real and personal estates and this Act had not been passed."

Sect. 5 provides for the valuation of real estate upon a basis of 20 years' purchase, less the gross amount of charges; and s. 6 provides that the value of the personal estate shall be ascertained by deducting from the gross value all debts, funeral and testamentary (*i.e.*, administration (*u*)) expenses of the intestate and all other lawful liabilities and charges to which the personal estate shall be subject.

Act applies only where husband dies wholly intestate.

The Act only applies to the case of a man dying wholly intestate, and does not, like the Statute of Distributions, apply to cases of partial intestacy (*x*).

Time of valuation.

The value of the intestate's real and personal estates must be taken as at his death; so that if the intestate was at his death entitled to a contingent reversionary interest, it must be taken at its then value and not at the value when the interest subsequently fell into possession (*y*).

(*u*) See *Re* Twigg's Estate, [1892] 1 Ch. 579, 589.

(*x*) *Ibid.* A person has died intestate within the meaning of the Act, if there was a complete failure by lapse of all the beneficial interests under his will and the person named executor predeceased him: *Re* Cuffe, [1908] 2 Ch. 500.

(*y*) *Re* Heath, [1907] 2 Ch. 270.

Widow's dower.

The widow of a man dying intestate or partially intestate as to real estate will be entitled to dower out of his real estate under the Dower Act (3 & 4 Will. IV. c. 105) unless she is barred by a declaration in the deed of conveyance to her husband under s. 6, or by a declaration in her husband's Will under ss. 7 & 8, or under s. 9 of the Act by reason of the widow taking under her husband's Will any estate or interest in land out of which the widow would be entitled to dower if the same were not so devised, unless a contrary intention shall be declared by the Will.

A general devise and bequest (including real estate) upon trust for sale with a direction to set apart out of the proceeds £1,000, and pay the income to the widow for life, is an interest in land within the meaning of s. 9 so as to defeat the widow's right to dower (*z*).

The charge of £500 under the Act of 1890 comes before the widow's right to dower, and consequently her right to dower out of the residue of the real estate is diminished proportionately (*a*).

Exclusion of wife by agreement.

A wife may by agreement exclude her title to participate under the Statute of Distributions, and such an agreement will apply equally in favour of the next-of-kin as of the legatees under the Will of her husband, that is, whether the husband die intestate or testate. But in the absence of agreement a declaration by the Will of her husband excluding her title is deemed to be merely for the benefit of the person in favour of whom the property is bequeathed, so that if the purpose fail there is no reason why the exclusion should continue (*b*). The testator may, however, show the intention of an absolute exclusion of his widow from any share which may accrue under any circumstances, in which case she may be put to her election and her share under the statute will

Effect of declaration by Will of husband.

(*z*) *Re* Thomas, (1886) 34 C. D. 166. As to the position of dowress at law and in equity, and effect of Statutes of Limitations as affecting her rights, see Williams *v.* Thomas, [1909] 1 Ch. 713.

(*a*) *Re* Charriere, [1896] 1 Ch. 912.

(*b*) Roper on Husband and Wife (2nd ed.) vol. 2, p. 22.

enure for the benefit of the next-of-kin as a gift by implication (*c*).

When distributive share satisfies husband's covenant to leave property to his wife.

Where a husband covenants to leave or pay at his death a part of his estate or a sum of money to his widow, such covenant will be deemed satisfied by the distributive share to which on his intestacy she becomes entitled under the statute, either wholly if such share is more than what is covenanted to be left or paid, or *pro tanto* if less (*d*). But this principle does not apply where the contract is to be fulfilled in the husband's lifetime and there has been a breach (*e*). And where the covenant was entire to pay a definite sum to trustees who were to hold part for the widow absolutely and as to the rest to pay the interest to her for life only, it was held in *Couch* v. *Stratton* (*f*) that since the latter not being given absolutely could not be considered satisfied out of the distributive share neither could the former (*g*). But in *Salisbury* v. *Salisbury* (*h*), in the case of a covenant to pay an annuity, Wigram, V.-C., while feeling compelled to follow the decision of the Lord Chancellor in *Couch* v. *Stratton*, stated he could not understand why the rule which is applied in the case of a gross sum should not also be applicable to an annuity, and he treated the case as one in which performance and not satisfaction is to be shown.

(*c*) Lett *v.* Randall, (1855) 3 Sm. & G. 83.

(*d*) Garthshore *v.* Chalie, (1804) 10 Ves. 1; and see *ante*, p. 515.

(*e*) Oliver *v.* Brighouse, (1732) referred to in Lee *v.* D'Aranda, 1 Ves. Sen. 1; Lang *v.* Lang, (1837) 8 Sim. 451, 465.

(*f*) (1799) 4 Ves. 391.

(*g*) *Ibid.*

(*h*) (1848) 6 Hare, 526.

CHAPTER XL.

OF REFUNDING OF LEGACIES (*a*).

General proposition, executor cannot retract his assent.

ALTHOUGH it is true, as a general proposition, that if an executor once assents to a legacy he can never afterwards retract (*b*), yet under certain circumstances legatees are bound to refund their legacies or a rateable part (*c*).

Presumption that executor paying a legacy has sufficient to pay all.

Whenever an executor pays a legacy the presumption is he has sufficient to pay all legacies ; and the Court will oblige him, if solvent, to pay the rest, and not permit him to bring an action to compel the legatee, whom he voluntarily paid, to refund (*d*).

Exceptions.

Payment under compulsion of suit.

But where the payment of the legacy by the executor is under the compulsion of a suit, he is entitled to compel the legatee to refund in case of a deficiency of assets (*e*).

Payment without notice of debts.

If an executor pays away the residue to the residuary legatee without knowledge of anything that interferes with the right to receive it, and debts are subsequently discovered which he is liable to pay, he can call on the residuary legatee to refund (*f*). But if an executor pays the money to the residuary legatee with knowledge of a debt, and he is afterwards obliged to pay the debt, he cannot call on the residuary legatee to refund (*g*).

Notice of a mere liability is not enough ; there must be notice of a debt. Considering how many persons are liable on shares in public companies and on leases, it would produce enormous difficulty in the administration of estates to lay

(*a*) See *ante*, p. 399, as to creditors following assets.

(*b*) Williams (10th ed.) 1108 ; and see Doe *v.* Guy, (1802) 3 East, 120, 123.

(*c*) Williams (10th ed.) 1188.

(*d*) Orr *v.* Kaines, (1750) 2 Ves. Sen. 194.

(*e*) Williams (10th ed.) 1188.

(*f*) Whittaker *v.* Kershaw, (1890) 45 C. D. 320, 325.

(*g*) *Ibid.*

down that an executor must keep assets in hand until every liability of the estate has been satisfied (*h*).

Capital only without intermediate income recoverable.

An executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee without any intermediate income (*i*).

In administration proceedings Court will compel restitution as between beneficiaries

Where trustees, under an erroneous view of a Will, pay to parties money to which they are not entitled, the Court, in administering the estate, will compel a restitution and repayment, and will give a lien on the other interests of such parties under the Will, even as against an assignee for valuable consideration (*k*).

So where a beneficiary has been paid less income than he is entitled to he may claim to have the payments equalised out of future income ; but where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their share of income, and died, it was held that his executors could not recover from the other beneficiaries the amounts so overpaid, or claim to have accrued or future income impounded till the shares were equalised, as he was the person responsible for the mistake (*l*).

It would seem that in no case where the executor is solvent can an unsatisfied legatee maintain a suit against another who has been satisfied ; because the remedy is in the first place against the executor, who, by paying the one legacy, has admitted assets to pay all (*m*). But it is not correct to say that you cannot recover from a person who has received a trust fund the money improperly paid him except through the instrumentality of the trustee. Where the Court is administering the funds, if a person has been overpaid, and there are funds belonging to him, the Court may so adjust the rights as to rectify the overpayment. Also trust money actually remaining in the hands of the person in whose hands it has been wrongly placed may be followed. So also where trust funds have been received by a person with knowledge

(*h*) *Whittaker* v. *Kershaw*, (1890) 45 C. D., at p. 326.

(*i*) Jervis *v.* Wolferstan, (1874) L. R. 18 Eq. 18.

(*k*) Dibbs *v.* Goren, (1849) 11 Beav. 483.

(*l*) *Re* Horne, [1905] 1 Ch. 76.

(*m*) Williams (10th ed.) 1191.

that they are wrongly paid to him, even though the funds do not remain in his hands, he must be treated as a constructive trustee and liable to repay the value of the trust funds wrongly paid to him (*n*).

An action brought in the Chancery Division by one *cestui que trust* against another *cestui que trust* to recover money wrongly paid by the trustee to the latter under a common mistake of fact is in the nature of a Common Law action for money had and received, and the Court, acting on the analogy of the Limitation Act (21 Jac. I. c. 16), will hold the claim to be barred after the lapse of six years (*o*).

If fund appropriated fails, others interested under Will not liable to contribute to make good loss.

If an executor makes payments to a trustee for a legatee, or makes such an appropriation as is equivalent to payment, the other persons entitled under the Will are not to be called on to contribute for any loss which may afterwards happen to the fund so paid or appropriated (*p*).

If there be no payment and no appropriation equivalent to payment, there is no reason why, if anything afterwards comes to the hands of the executors, it should not be applied in discharge of the legacies of the unpaid legatees. Accordingly, where the surviving executor and trustee had invested, in his own name, in the purchase of Consols, the amount of an infant's legacy, minus the legacy duty, but without any declaration of trust, and afterwards misappropriated the Consols, it was held not to be an appropriation and consequently that further assets unexpectedly falling in ought in the first place to be applied in making good the infant's legacy (*q*).

The residuary legatee can take nothing till all the pecuniary legatees have been paid, unless they consent (*r*).

Effect of executor wasting the estate while

If the assets be originally sufficient to satisfy all the legacies, and one of the legatees procures from the executor,

(*n*) *Re* Robinson, [1911] 1 Ch. 502, 513, explaining Harris *v.* Harris, No. 2, (1861) 29 Beav. 110.

(*o*) *Re* Robinson, *ubi sup.*

(*p*) Willmott *v.* Jenkins, (1838) 1 Beav. 401.

(*q*) *Ibid.*

(*r*) Baker *v.* Farmer, (1868) L. R. 3 Ch. 537.

some legacies remain unsatisfied.

either by means of or without a suit, payment of his legacy, and afterwards the executor wastes the estate so as to render it deficient to discharge the remaining bequests, those legatees cannot oblige the satisfied legatee to refund, first, because the payment was not a devastavit by the executor, and secondly, because the legatee is protected by the principle that *vigilantibus, non dormientibus, jura subveniunt* (*s*). Still less could they have any such right when the loss has arisen from accidental misfortune without any fault of the executor (*t*).

Same rule in the case of payment of one of several residuary legatees or next-of-kin.

So also where one of several residuary legatees or next-of-kin has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; but it is otherwise if the wasting has taken place before such share was received (*u*).

Distribution without notice that intestate had been bankrupt.

Where an undischarged bankrupt died leaving property acquired after the bankruptcy, and his administrator without notice of the bankruptcy distributed the property among the bankrupt's next-of-kin before the trustee in bankruptcy intervened, it was held that the administrator was protected by the administration bond, but that the next-of-kin must refund the share they had respectively received (*x*).

Effect of payment under order of the Court.

Although distribution under order of the Court exonerates the executors or administrators from further liability (*y*), yet it does not exonerate the residuary legatee from liability to refund in case the legatee has been paid without regard to the rights of creditors (*z*) or other legatees (*a*).

Liability of Consolidated Fund.

Where money is ordered to be paid out of Court to a person apparently but not really entitled, and the Paymaster-General obeys the order, the person really entitled, though not before the Court when the order was made, has no claim

(*s*) Roper on Legacies, p. 459, approved by Turner, L.J., in Fenwick *v.* Clarke, (1862) 4 De G. F. & J. 240.

(*t*) Fenwick *v.* Clarke, *ubi sup.*

(*u*) Peterson *v.* Peterson, (1866) L. R. 3 Eq. 111; *Re* Winslow, [1890] 45 C. D. 249; *Re* Lepine, [1892] 1 Ch. 210.

(*x*) *Re* Bennett, [1907] 1 K. B. 149.

(*y*) See *post*, p. 674.

(*z*) See *ante*, p. 399.

(*a*) See *ante*, p. 546, and *Re* Williams' Settled Estates, [1910] 2 Ch. 481, 497.

upon the Consolidated Fund (*b*), unless payment was made under a forged power of attorney (*c*) or the Paymaster-General has been deceived and has not paid as directed by the order (*d*), or in cases of a like nature.

(*b*) *Re* Williams' Settled Estates, [1910] 2 Ch. 481.

(*c*) Slater *v.* Slater, [1897] 1 Ch. 222, n.

(*d*) Marsh *v.* Joseph, [1897] 1 Ch. 213.

CHAPTER XLI.

OF ASSIGNMENT OF LEGACIES AND RESIDUARY PERSONALTY.

SECT. 1.—*By Act of Parties.*

Assignability of equitable choses in action.

LEGACIES and residuary personalty are equitable choses in action, and even before the year 1875, when debts and other legal choses in action were by the Judicature Act, 1873 (*a*), made assignable at law, legacies and residuary personalty were assignable in equity, and the assignee could sue in his own name in equity to recover them without joining the assignor as a party to the proceedings (*b*). The equitable assignee, however, took subject to all prior equities, and under the Judicature Act the assignment is to be deemed effectual subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed.

Assignee takes subject to prior equities.

Effect of notice: on priority;

The rule established by *Dearle* v. *Hall* (*c*) is, in the words of Lord Macnaghten in *Ward* v. *Duncombe* (*d*), "That an assignee of an equitable interest in personal estate without notice of an existing prior assignment may gain priority simply by the act of giving notice to the person who has legal dominion over the fund before notice is given by the earlier assignee" (*e*).

The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land (*f*).

(*a*) 36 & 37 Vict. c. 66, s. 25 (6); and see Jones *v.* Humphreys, [1902] 1 K. B. 10, that an indefinite and unascertained amount of a debt cannot be absolutely assigned within the meaning of the Act. It is doubtful whether the Act applies to a part of a debt: *ibid.*; and see Skipper and Tucker *v.* Holloway and Howard, [1910] 2 K. B. 630; Forster *v.* Baker, [1910] 2 K. B. 636. Leave to issue execution will not be granted to such an assignee: Forster *v.* Baker, *ubi sup.*

(*b*) See White & Tudor's L. Cas. notes to Ryall *v.* Rowles, (1749) 1 Ves. Sen. 348.

(*c*) (1823) 3 Russ. 1.

(*d*) [1893] A. C. 384.

(*e*) Per Stirling, L.J., in *Re* Dallas, [1904] 2 Ch. 385, 415.

(*f*) Wigram *v.* Buckley, [1894] 3 Ch. 483.

The priority of equitable assignees or incumbrancers will be according to the dates of the notices given by them to the executor or administrator.

on relative position of personal representative.

Though trustee for the persons entitled to the fund, whether he knows their names or not, that is to say before notice, the notice places the executor or administrator under a direct responsibility to the person who gives the notice, and if he disregards the notice he does so at his peril. Though in the absence of notice he would be safe in paying away the fund to those who appear by the instrument constituting the trust, or by title properly deduced from them, to be the true owners (*g*).

Executor renouncing.

Notice to an executor who afterwards renounces without having in any way acted in the office is invalid (*h*).

Assignor being same as assignee.

Notice given by an assignee of a fund to the person who is himself the assignor is not an effectual notice so as to alter priorities (*i*).

Effect of there being no trustee at date of assignment.

The rule in *Dearle* v. *Hall* applies equally although there is no trust fund and no trustee in existence at the date of the several assignments, as in the case of an assignment of a mere expectancy such as a legacy under the Will of a living person : the assignee who first gives notice to the legal personal representative on the death of the testator has priority (*k*).

Where there are several trustees :

notice to one only :

Where there are several trustees, and, at the time the second incumbrance is made, one of the trustees has notice of a prior incumbrance, notice of the second incumbrance will not give it priority over the earlier assignment, since the party giving notice had taken the property out of the apparent ownership and possession of the *cestui que trust ;*

effect of his death after second assignment ;

and the priority of the prior incumbrance is not affected by the trustee to whom he has given notice dying or ceasing to act after the time of the second incumbrance and notice to the trustees.

effect of his death before second assignment.

Where, however, notice is given to one trustee

(*g*) See per Ld. Macnaghten in Ward *v.* Duncombe, [1893] A. C. 384, 392 ; and see *post*, p. 612.

(*h*) *Re* Dallas, [1904] 2 Ch. 385.

(*i*) Browne *v.* Savage, (1859) 4 Drew. 635.

(*k*) *Re* Dallas, *ubi sup.*

only, who is no longer a trustee at the time the second incumbrancer advances his money, the fund is again in the apparent possession of the *cestui que trust*, and in those circumstances the title of the second incumbrancer or assignee who had given notice must prevail over that of the assignee or incumbrancer earlier in date (*l*).

Distinction in case of several executors.

But in the case of several executors it is advisable to give notice to all of them, since each has separate authority to receive and pay on account of the estate, and, if he has no notice of an assignment, he may make payment to the assignor without incurring any liability on that account (*m*).

Priority determined by law of England.

Where the fund is an English trust fund the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the Court which is administering the fund, and accordingly although the validity of an assignment has to be determined by the law of the place where it was executed, yet the priority of assignees will be determined by the law of England, notwithstanding the doctrine of notice is not recognised by the law of the place where the assignment was executed (*n*).

Debtor to estate cannot claim benefit without contributing debt.

A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it (*o*). This principle applies to debts owing to the deceased which at the time of his death were barred by the Statute of Limitations (*p*), also to loss occasioned after his death by reason of a breach of trust by a trustee legatee, and to costs or expenses incurred in an administration of the estate which a legatee is liable to make good (*q*). But it does

(*l*) See per Ld. Herschell, L.C. in Ward *v.* Duncombe, [1893] A. C., at pp. 381, 382; *Re* Phillips' Trusts, [1903] 1 Ch. 183.

(*m*) Timson *v.* Ramsbottom, (1837) 2 Keen, 35, 53, commented on in Ward *v.* Duncombe, *ubi sup.*

(*n*) Kelly *v.* Selwyn, [1905] 2 Ch. 117.

(*o*) *Re* Akerman, [1891] 3 Ch. 212, 219, per Kekewich, J.; see *ante*, p. 516.

(*p*) *Ibid.*

(*q*) *Re* Knapman, (1881) 18 C. D. 300.

not apply where the only interest which the trustee has in another fund in which the *cestuis que trust* whose property has been misappropriated have no interest at all, as for instance, a specific legacy given by the Will to the trustee (*r*).

Assignee or mortgagee of beneficiary in no better position.

Persons who claim by mortgages or absolute assignments from legatees are not in any better position, even though the breach of trust or the costs or expenses arise subsequently to the assignment (*s*). Every person who takes an assignment, whether by mortgage or otherwise, of a share in the hands of a legal personal representative, must take subject to the settlement of accounts as between the assignor and the legal personal representative ; and it matters not whether those accounts are accounts in the administration of the estate, or accounts between the assignor and the legal personal representative (*t*). The assignee of a contingent or reversionary legacy will, when the legacy becomes payable, be subject to this right if the legatee would himself have been subject to it in the absence of any assignment (*u*). A fund carried to a separate account in an administration action is thereby released from the general questions in the cause, consequently as against an assignee of the fund, for value and without notice, it cannot be made liable for the general liability of the assignor (*x*).

Effect of covenants in marriage settlements to settle after-acquired property.

Questions frequently arise on the distribution of estates as to the effect of covenants in marriage settlements to bring into settlement after-acquired property of the wife where the wife has survived her husband. In construing such covenants the first thing to do is to consider who are the covenanting parties. If the husband only is the covenanting party, there is a strong *primâ facie* reason for saying that the sole object of the covenant was to exclude the right which the husband would have taken in his wife's property, and not to

(*r*) *Re* Towndrow, [1911] 1 Ch. 662.

(*s*) Morris *v.* Livie, (1842) 1 Y. & C. Ch. 380 ; *Re* Knapman, *ubi sup.* ; Doering *v.* Doering, (1889) 42 C. D. 203.

(*t*) *Re* Jones, [1897] 2 Ch. 190, 203.

(*u*) *Re* Batchelor, (1873) L. R. 16 Eq. 481, 484.

(*x*) Edgar *v.* Plomley, [1900] A. C. 431.

bind her interest in favour of the persons entitled under the settlement. On the other hand, where the wife and husband both joined in the covenant there is a strong *primâ facie* reason for saying that the object of the parties was not only to exclude the husband's marital right, but to make a provision out of the wife's property for her issue or the other persons entitled under the trusts of the settlement. Another consideration is, who is to join in and take part in the settlement, because, even if the wife is a party to the covenant, yet if the covenant is only that the husband shall do something, and not that the wife shall concur in doing it, an inference arises similar to that which arises where the husband alone is the covenantor (*y*).

There is no general rule of construction relating to such covenants that a gift from husband to wife during coverture is to be excluded (*z*).

Where the husband has acquired a legal title as administrator of his wife to property which was subject to the contract to settle, volunteers (*e.g.*, next-of-kin of the wife) are not entitled to enforce against that legal title the contract to create a trust contained in the settlement, and the trustees are not bound to take any steps to obtain a transfer of the property (*a*); and if the right of action under the covenant is barred by the statute the trustees cannot recover damages against the husband or the estate of the wife (*b*).

By the Married Women's Property Act, 1907 (7 Edw. VII. c. 18), s. 2, a settlement or agreement for a settlement made after the 1st January, 1908, by the husband or intended husband respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age; but if she died an infant the husband's

(*y*) See Lloyd *v.* Prichard, [1908] 1 Ch. 265, 273, per Parker, J., and cases referred to. See also Tremayne *v.* Rashleigh, [1908] 1 Ch. 681.

(*z*) *Re* Ellis's Settlement, [1909] 1 Ch. 618; *Re* Plumtre's Marriage Settlement, [1910] 1 Ch. 609.

(*a*) *Re* Plumtre's Marriage Settlement, *ubi sup.*

(*b*) *Ibid.*; Spickernell *v.* Hotham, (1854) Kay, 669; but see Pullan *v.* Koe, [1913] 1 Ch. 9.

covenant shall bind him. Moreover the Act does not affect the provisions of the Infants' Settlements Act, 1855.

Custody of documents of title of assignee.

On the distribution of a trust fund the trustee has no right to require the delivery to him of the assignment and other documents of title before payment of the share to the assignee ; and where money is paid to a person who receives it under a power of attorney, the trustee cannot claim that the power of attorney should be given up to him (*c*).

Sect. 2.—*By Act of Law.*

(1) *Marriage.*

The title of the husband, as well in cases where the marriage took place prior to the Married Women's Property Act, 1882, as in cases of marriage subsequently to that Act, has already been considered (*d*).

(2) *Bankruptcy.*

Relation back to act of bankruptcy.

By s. 43 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy on which a receiving order is made against him, or in the case of more acts of bankruptcy than one to the time of the first of the acts committed within three months next preceding the date of the presentation of the bankruptcy petition.

Property which vests in the trustee in bankruptcy.

By s. 44 the property which under s. 54 vests in the trustee on his appointment includes all such property (*e*) as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge. A contingent interest passes to the trustee in bankruptcy, but not the mere possibility of an interest, as for instance what a bankrupt may subsequently become entitled to under the exercise of a power of appointment (*f*).

(*c*) *Re* Palmer, [1907] 1 Ch. 486.

(*d*) See *ante*, p. 325.

(*e*) See s. 168 for definition of word "property."

(*f*) *Re* Vizard's Trusts, (1866) L. R. 1 Ch. 588, and see Williams' Bankruptcy Practice, 8th ed. p. 202.

The title of the trustee is defeated in favour of a purchaser for value without notice on a sale after the act of bankruptcy of the settlor by the donee under a voluntary settlement made prior thereto (*g*).

Power of disposition by bankrupt of after-acquired property until trustee intervenes.

A bankrupt who acquires property after his bankruptcy acquires it as agent for the trustee, and is entitled to deal with it as such agent, unless and until the trustee as principal intervenes (*h*). Until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bonâ fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee (*i*). This doctrine applies to a legacy and a share of residue under a Will even where the trustee intervenes before the bequeathed property has reached the hands of a *bonâ fide* equitable assignee (*k*). It also applies to leaseholds (*l*), but it does not apply to real estate (*m*); although where there is an agreement for an advance and a charge contemporaneous with and to enable the purchase of real estate, and the lender has no notice of the bankruptcy, the charge will be supported against the trustee (*n*). The principle applies to after-acquired real estate which undischarged bankrupts purchase as partners for partnership purposes and sell and convey to a *bonâ fide* purchaser for value before the trustee intervenes (*o*).

Trustee in bankruptcy in similar position as assignee for value as to giving notice.

A trustee in bankruptcy is in no better position than an assignee for value, and it is incumbent on him to perfect his title by giving notice, or obtaining a stop order which is equivalent to notice, and if he fails to do this he will be postponed to a subsequent mortgagee or assignee who has given notice or has obtained a stop order (*p*). If the par-

(*g*) *Re* Hart, [1912] 3 K. B. 6.

(*h*) Herbert *v.* Sayer, (1844) 5 Q. B. 965.

(*i*) Cohen *v.* Mitchell, (1890) 25 Q. B. D. 262, 267.

(*k*) Hunt *v.* Fripp, [1898] 1 Ch. 675; *Re* Behrend's Trust, [1911] 1 Ch. 687.

(*l*) *Re* Clayton and Barclay's Contract, [1895] 2 Ch. 212.

(*m*) *Re* New Land Development Association and Gray, [1892] 2 Ch. 138.

(*n*) Bird *v.* Philpott, [1900] 1 Ch. 822.

(*o*) *Re* Kent County Gas Light and Coke Co., Ltd., [1909] 2 Ch. 195.

(*p*) Stuart *v.* Cockerell, (1869) L. R. 8 Eq. 607; *Re* Russell's Policy Trusts,

ticular assignee from the undischarged bankrupt has not perfected his title by notice to the holder of the fund or by a stop order, the trustee in bankruptcy as general assignee can by intervening and claiming the fund from the bankrupt, and giving notice to the holder of the fund, or by stop order, if the fund is in Court, perfect his title first to the exclusion of the particular assignee (*q*).

Title of trustee in bankruptcy subject to equities subsisting at commencement of bankruptcy.

Although the general rule is that, as between several assignees or incumbrancers of a chose in action, the assignee or incumbrancer who first gives notice obtains priority, yet a trustee in bankruptcy is not an assignee for value but a statutory assignee, and a chose in action vests in him subject to all equities existing therein at the date of the commencement of the bankruptcy, and he cannot obtain priority over a good equitable mortgagee thereof for value, made prior to the bankruptcy, merely by giving notice before the mortgagee (*r*).

Effect of a second bankruptcy.

An undischarged bankrupt has power to dispose of any part of his assets that may remain after payment of his liabilities before the surplus is ascertained ; and if an undischarged bankrupt is made bankrupt a second time the trustee in the second bankruptcy only takes that part of the surplus which has not been effectually dealt with by the bankrupt before the date of the second bankruptcy (*s*). Consequently as between two trustees in successive bankruptcies the second trustee does not acquire a title as against the first trustee (*t*).

Effect of close of bankruptcy.

By s. 160 of the Act of 1883, on the close of a bankruptcy, property which vested in the trustee and is not realised or distributed vests in such person as may be appointed by the Board of Trade for that purpose.

(1872) L. R. 15 Eq. 26 ; Palmer *v.* Locke, (1881) 18 C. D. 381.

(*q*) Mercer *v.* Vans Colina, (1897) 67 L. J. Q. B. 424 ; *Re* Beall, [1899] 1 Q. B. 688.

(*r*) *Re* Wallis, [1902] 1 K. B. 719 ; *Re* Anderson, [1911] 1 K. B. 896 ; and see *post*, p. 685.

(*s*) Bird *v.* Philpott, [1900] 1 Ch. 822.

(*t*) *Ex parte* Ford, (1876) 1 C. D. 521 ; *Re* Clark, [1894] 2 Q. B. 393.

(3) *Conviction for Felony.*

Vesting of property in administrator appointed under 33 & 34 Vict. c. 23.

Under 33 & 34 Vict. c. 23, the Crown may appoint administrators of any convict's property, and upon the appointment of any such administrator all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards while subject to the operation of the Act, become or be entitled, vests in such administrator. If no such administrator shall have been appointed, an interim curator of the property of any convict may be appointed by justices, provided that no property acquired by a convict during the time while he shall be lawfully at large under any licence shall vest in any administrator so appointed; but the convict shall be entitled thereto without any interference on the part of any administrator or interim curator appointed under the Act.

(4) *Equitable Execution.*

Equitable execution does not create a charge.

The appointment of a receiver by way of equitable execution does not create an equitable interest in the nature of a charge; it is simply an uncompleted process to obtain payment of money (*u*).

Prevents judgment debtor receiving or dealing with fund to the prejudice of judgment creditor.

A receivership order obtained by a judgment creditor by way of equitable execution over a judgment debtor's share of a testator's residuary personal estate, partly in Court in an administration action, and partly in the hands of the executor who has direct notice of the order, though not creating a charge, prevents the judgment debtor from receiving the share, or from dealing with it to the prejudice of the judgment creditor; and if, at the date of the receivership order, the residue is unascertained and the fund then in Court is insufficient for the testator's debts, so that the judgment debtor's share cannot then be taken in execution or made available by any other legal process, it prevents any subsequent mort-

(*u*) *Re* Potts, [1893] 1 Q. B. 648.

gagee or judgment creditor from gaining priority by means of a stop order or charging order (*x*).

Equitable execution may be given to a judgment creditor as regards cash standing to the credit of the judgment debtor in the Chancery Division by a charging order, without appointing a receiver, and notice of the charging order to the Paymaster-General has the effect of a stop order (*y*).

(5) *Garnishee Order.*

When money in hands of trustee may be attached.

A garnishee order under Ord. 45 of R. S. C. can only be obtained where there is a debt either legal or equitable which may be attached. Moneys which may or may not become payable from a trustee to his *cestui que trust* are not debts. A trustee is not an equitable debtor to the *cestui que trust* until there is money in his hands which he ought to pay to his *cestui que trust*, or until he has made himself personally liable to pay money to his *cestui que trust* by reason of some breach of trust or default in the performance of his duties as trustee (*z*).

Effect of garnishee order.

The effect of the garnishee order is to give the garnishor a lien on the debt, but it can only bind so much of the debt as the judgment debtor can honestly deal with when the order is obtained and served, and does not affect the claims of creditors in whose favour he has charged the debt, though they have not given notice of their claims (*a*).

A garnishee order *nisi* does not create a charge until service of it on the garnishee (*b*).

(*x*) *Re* Marquis of Anglesey, [1903] 2 Ch. 727.

(*y*) Brereton *v.* Edwards, (1888) 21 Q. B. D. 488. It would seem that notice to the Paymaster-General of a receivership order is also sufficient to secure priority without obtaining a stop order; see *Re* Galland, (1886) W. N. 96.

(*z*) Webb *v.* Stenton, (1883) 11 Q. B. D. 518.

(*a*) *Re* Marquis of Anglesey, *ubi sup.*, at p. 732. For forms of garnishee orders, see Seton (7th ed.) Chap. 28, s. II.

(*b*) Hamer *v.* Giles, (1879) 11 C. D. 942; and see Ord. 45, r. 2.

(6) *Charging Orders under* 1 & 2 *Vict. c.* 110, *and* 3 & 4 *Vict. c.* 82.

Against what property charging orders can be made.

Charging orders under the Judgments Acts, 1838 and 1840 (1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1), may be made against the interest of any judgment debtor in any government stock, funds, or annuities, or any stock or shares (*c*) in any public company, whether such interest is in possession, remainder or reversion and whether vested or contingent (*d*).

Where stock is vested in personal representatives or trustees, and there is no imperative trust for sale, so that the judgment debtor may acquire an absolute title to a portion of the stock in specie, so long as the stock remains unsold the judgment debtor has an interest in it, and an order may be made charging the interest of the judgment debtor, whatever it may be in the stock (*e*).

The same rule must be applied to charging orders obtained under the statutes 1 & 2 Vict. c. 110 and 3 & 4 Vict. c. 82 as to garnishee orders. They are both processes of execution to enforce payment of money under a judgment or order, and the execution creditor can only obtain what the judgment debtor can honestly give him (*f*).

There is no power under 1 & 2 Vict. c. 110, s. 14, after the death of a judgment debtor to make a charging order against his executor in respect of a judgment debt of the deceased, unless in some way judgment has been first obtained against the executor (*g*).

(7) *Stop Order.*

Effect of

Where moneys or securities are in Court to the general credit of any cause or matter, or to the account of any class

(*c*) This does not include debentures, Sellar *v.* Charles Bright & Co., Ltd., [1904] 2 K. B. 446, nor money; but see *ante*, p. 609, under Equitable Execution. Under Ord. 46, r. 3, of R. S. C. a notice filed under r. 4 (instead of a writ of *distringas*) is made to affect stock, shares, securities and dividends; such a notice however, does not create a charge.

(*d*) For forms of charging orders, see Seton (7th ed.) Chap. 28, s. I.

(*e*) Bolland *v.* Young, [1904] 2 K. B. 824.

(*f*) *Re* Marquis of Anglesey, [1903] 2 Ch. 727; and see *post*, p. 685.

(*g*) Stewart *v.* Rhodes, [1900] 1 Ch. 386.

of persons, the Court has jurisdiction, in a summary way, to make an order to prevent the transfer or payment of such moneys or securities, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise to any share or portion of such moneys or securities, but the person by whom any such order is obtained is liable at the discretion of the Court to pay any costs, charges and expenses thereby occasioned (*h*). The order prevents payment without notice, but does not decide as to the rights of the parties (*i*).

So long as a fund is in the hands of trustees notice to them is sufficient to perfect the security of an assignee or incumbrancer, but on payment of the fund into Court the Court assumes the trusteeship and a stop order is then necessary to perfect the security (*k*). By notice the legal holder whose duty it is to distribute the fund is converted into a trustee for the new purchaser, and is charged with responsibility towards him. A fund in Court is under the custody and control of the Court and a stop order has the same and no greater effect than notice given to the executor of a Will where the fund is not in Court. Until the fund is protected, either by notice or by a stop order, the legal holder is entitled to deal with the fund without regard to the rights of third parties (*l*).

Priority of assignees.

If there are several assignments of an interest in personal estate the assignee is entitled to priority who, without notice of a prior assignment at the time of making his advance, gives notice first to the legal holder of the fund whose duty it is to distribute it. So also the ordinary rule is that priority is given to the person obtaining a stop order on a fund in Court over prior incumbrances of which he has no notice where no stop order has been obtained (*m*).

(*h*) See 5 Vict. c. 5, s. 4 (repealed by 55 & 56 Vict. c. 19); Ord. 46, rr. 1 and 3; and Brereton *v.* Edwards, (1888) 21 Q. B. D. 488. For forms of stop orders, see Seton (7th ed.) Chap. 28, s. III.

(*i*) Lucas *v.* Peacock, (1846) 9 Beav. 177.

(*k*) Pinnock *v.* Bailey, (1883) 23 C. D. 497.

(*l*) Stephens *v.* Green, [1895] 2 Ch. 148; Montefiore *v.* Guedalla, [1903] 2 Ch. 26.

(*m*) *Ibid.*

Notice.

An incumbrancer who obtains a stop order does not lose his priority over a previous incumbrancer by the fact that he had notice of the previous incumbrance at the time of obtaining the stop order, if he had no notice of it when he took his security (*n*). A second incumbrancer of a fund in Court, who at the time of taking his security had notice of the existence of the first incumbrance, cannot by obtaining a stop order gain priority over the first incumbrancer, even though the latter never obtains a stop order (*o*).

Although as a general rule where in administration proceedings a fund is brought into Court the incumbrancer who gets the first stop order on it thereby gains priority, yet this does not apply where due notice to the trustee was previously given by the incumbrancer (*p*). Nor will a stop order obtained after a fund is transferred from the general credit of the action to the separate account of the beneficiary and his incumbrancers, and an inquiry is ordered as to their priority, affect a stop order previously obtained before the transfer, for in such case the Court holds the fund as a trustee for the persons entitled thereto in order of their priorities (*q*).

Effect of transfer to separate account.

Where a fund in Court in an administration suit is carried to a separate account, the persons specified in its heading are the owners of the fund, so far as is consistent with its retention in Court, released from the general questions in the cause and free from claims by other shares in the estate. While the fund remains in Court other parties to the suit may show that they have claims enforceable against the fund which were not known or were not existent when the fund was separated, and by proper proceedings enforce them, notwithstanding the order for separating the fund, yet until that step is taken the separation is rightly looked upon as showing that the separated fund is free from such claims, and such general liability to other parties to the suit cannot be enforced

(*n*) Mutual Life Assurance Society *v.* Langley, (1886) 32 C. D. 460.

(*o*) *Re* Holmes, (1885) 29 C. D. 786.

(*p*) Livesey *v.* Harding, (1850) 23 Beav. 141.

(*q*) Lister *v.* Tidd, (1867) L. R. 4 Eq. 462.

against the fund in the hands of an assignee for value without notice (*r*).

Where a fund is carried over to a separate account in pursuance of a declaration of title, such declaration is binding on all parties properly brought before the Court unless and until it is successfully appealed against, but where the fund is carried over without any declaration of title and merely for convenience of administration the Court can at any time before final distribution rectify and adjust administrative orders so as to ensure full and complete justice. The carrying over to the separate account of a purchaser, subject to a life interest, is not equivalent to transfer or payment so as to give the purchaser a legal title (*s*).

Stock, etc., standing in books of a company.

Notice in lieu of *distringas*.

Where stock, shares or securities are not in Court but are standing in the books of a company any person claiming to be interested therein may by notice filed under r. 4 of Ord. 46 of the R. S. C. entitle himself to receive notice if anyone wishes to transfer the fund, but unless he then moves within eight days (r. 10) the *distringas* is gone (*t*).

(8) *Solicitor's Lien.*

Solicitor's lien:

at common law;

At common law a solicitor has a lien on a fund recovered in an action for his costs in a suit, which gives him an interest in the fund itself, and has priority of payment out of the fund (*u*). This lien is, however, confined to the costs of the suit, and to his client's interest in the fund, and not so as to affect the rights of other persons (*x*), and it does not extend to real estate (*y*). It will not be barred by the Statute of Limitations (*z*).

under the Solicitors Act.

The Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28,

(*r*) Edgar *v.* Plomley, (1900) A. C. 431; and see *ante*, pp. 401, 604.

(*s*) Cloutte *v.* Storey, [1911] 1 Ch. 18.

(*t*) See 5 Vict. c. 5, s. 5, and Ord. 46, rr. 4, 8.

(*u*) Turwin *v.* Gibson, (1749) 3 Atk. 720; Lloyd *v.* Mason, (1844) 4 Hare, 132.

(*x*) Stephens *v.* Weston, (1824) 3 B. & Cr. 535.

(*y*) Shaw *v.* Neale, (1858) 6 H. L. C. 581, 601.

(*z*) Higgins *v.* Scott, (1831) 2 B. & Ad. 413; *Re* Brockman, [1909] 1 Ch. 354, 360; but see [1909] 2 Ch. 170, 175.

extends to all property recovered or preserved, and enables the Court to declare the solicitor entitled to a charge upon the property for the taxed costs, charges, or expenses of or in reference to the suit, matter or proceedings, and to make orders for taxation and raising and payment of the same ; and provides that all conveyances and acts done to defeat, or which shall operate to defeat, such charge shall, unless made to a *bonâ fide* purchaser for value without notice, be void as against such charge, but no order shall be made where the right to recover payment is barred by any Statute of Limitations.

The Court will not make an order under this section if the same costs have been already ordered to be paid out of a trust fund (*a*), unless before the costs have been taxed the solicitor is discharged and no longer acts for any party to the suit (*b*).

Effect of discharge of solicitor before trial.

If the solicitor is discharged before the trial of the action a charging order in his favour on a fund recovered will be subject to the lien for costs of the client's solicitor for the time being, since the solicitor acting for the plaintiff at the time the property was recovered, and the order made for payment, would have, independently of the act, a lien on the fund, and no charging order can be made interfering with that lien (*c*).

(*a*) *Re* Viney's Trusts, (1868) 18 L. T. 851 ; *Re* Cockrell's Estate, [1912] 1 Ch. 23.

(*b*) Pilcher *v.* Arden, (1877) 7 C. D. 318.

(*c*) *Re* Wadsworth, (1885) 29 C. D. 517, 520.

CHAPTER XLII.

OF LEGACIES TO INFANTS.

Payment cannot be made to a legatee under 21 years of age.

WHERE a legatee to whom a legacy is given direct, without the intervention of a trustee, is an infant, payment cannot be made to him until he attains the age of twenty-one years (*a*).

Legacy may be paid into Court.

The executor may, however, relieve himself from all responsibility by paying the amount of the legacy into Court under s. 42 of the Trustee Act, 1893 (56 & 57 Vict. c. 53) (*b*), and it would seem that this is the proper course to pursue in order to free the residue and stop payment of 4 per cent. interest (*c*).

Doubtful whether legacy can be paid to guardian of infant.

Whether a testamentary guardian appointed under 12 Car. II. c. 24 can give a discharge for a legacy payable to an infant is open to question, and it would be unwise for the executor to incur the risk (*d*).

Application of income for infant's benefit. Effect of s. 43 of 44 & 45 Vict. c. 41.

Sect. 43 of the Conveyancing and Law of Property Act, 1881 (*e*), provides that (1) "Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of

(*a*) See Williams (10th ed.) 1137. But the Court has authorised payment of a legacy to an infant at eighteen where the Will contained such a direction: *Re* Deneker, (1895) W. N. 28.

(*b*) Sect. 42 of the Trustee Act, 1893, is substituted for s. 32 of the Legacy Duty Act, 1796, which is repealed by the Act of 1893.

(*c*) *Re* Salaman, [1907] 2 Ch. 46.

(*d*) M'Creight *v.* M'Creight, (1849) 13 Ir. Eq. R. 314, and *Re* Cresswell, (1881) 45 L. T. 468.

(*e*) 44 & 45 Vict. c. 41.

that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not."

"(2) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorised to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year."

"(3) This section applies only if and as far as a contrary intention (*f*) is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained."

In *Re Smith* (*g*) it was held that when the estate is cleared, and the residue ascertained which belongs to an infant, the executor is a trustee of the residue for the infant within the meaning of s. 43 of the Act of 1881, and is entitled to apply the income for the infant's maintenance, education, or benefit as provided by that section, and that it makes no difference for this purpose whether a pecuniary legacy payable out of the estate is given to an infant or the residue of the testator's estate is given to an infant, as soon as that residue is ascertained. As soon as the legacy is assented to or the residue is ascertained it assumes the character of a trust fund. In *Re Adams* (*h*), Kekewich, J., in holding that the same principle applied to an administrator with the Will annexed, expressed the opinion that any man who held property which did not belong to him but to any infant, held that property as trustee

(*f*) As to what is "contrary intention," see *Re* Cooper, [1913] 1 Ch. 350.

(*g*) (1889) 42 C. D. 302.

(*h*) (1906) W. N. 220.

for the infant within the meaning of s. 43 of the Act of 1881, notwithstanding that for the purposes of other Acts, and in other connections, the word "trustee" might have an entirely different meaning.

There would seem to be no distinction between an executor or an administrator with the Will annexed and an administrator in the case of a complete intestacy holding an ascertained residue.

When infant may be entitled to maintenance out of a contingent legacy.

An infant cannot, under s. 43 of the Act of 1881, be maintained out of the income of a contingent legacy, unless, if he attains twenty-one, he would become entitled to the past income, as well as the *corpus* of the property (*i*). If a share of residue is given absolutely to an infant contingently on his attaining twenty-one, the infant will be entitled to both capital and arrears of income on attaining twenty-one, and s. 43 will apply (*k*). But if the infant only becomes tenant for life of the share of residue with the accretions on attaining twenty-one, the case does not fall within the language of s. 43, as interpreted by the Court of Appeal in *Re Dickson* (*l*).

A direction to segregate a fund to provide for the gift is the equivalent of a contingent legacy of the fund plus its income (*m*). But if the severance of a contingent deferred legacy from the general estate of a testator has been occasioned owing to the residue becoming payable before the legacy itself is payable, or from other cause unconnected with the legacy itself, such severance will not entitle the legatee to interim interest (*n*).

No distinction in application of principle to a contingent class gift.

There is no distinction in the application of the principle between a contingent gift on attaining twenty-one to one person or two or more by name or to a class, whether capable of increase or not. The income of property given contingently to a class of persons belongs to its members for the

(*i*) *Re* Dickson, (1885) 29 C. D. 331.

(*k*) *Re* Bowlby, [1904] 2 Ch. 685, 711, per Cozens-Hardy, L.J.

(*l*) *Ibid.*

(*m*) *Re* Bowlby, *ubi sup.*, at p. 704, per Vaughan Williams, L.J.; see also *Re* Clements, [1894] 1 Ch. 665.

(*n*) *Re* Judkin's Trusts, (1884) 25 C. D. 743.

time being, as against persons who are only entitled if and when the class ceases to exist. Each on attaining twenty-one is entitled to his share of the principal, and the increase which has been produced by it. The child who first attains twenty-one under such a class gift will receive only an aliquot share of the income in proportion to the number of existing children, subject to be increased if any child should die under twenty-one. The income of the contingent shares independently of the statute would be accumulated for the benefit of those who may become alternately entitled to it. To the income of such a contingent share the statute applies (*o*).

Contingencies to which s. 43 of the Conveyancing Act, 1881, applies.

The contingencies to which s. 43 of the Act of 1881 applies are "on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age." Consequently the section would not apply where the gift is contingent on the legatee being alive at the death of another person, although there may be the additional contingency of the legatee attaining twenty-one years of age, since the legatee may never become entitled at all (*p*).

Where there are two funds applicable for maintenance.

Where there are two funds, the income of which may be applied for maintenance, in the absence of any discretion, the allowance for maintenance should be paid primarily out of that fund from which it is most for the infant's benefit that it should be taken (*q*).

Maintenance out of contingent legacy where testator stood *in loco parentis*.

Although a contingent legacy does not carry interest while it is in suspense, yet in the case of a legacy by a parent or one standing *in loco parentis* to the legatee, the infant child, according to the practice of the Court of Chancery, is entitled to maintenance during minority out of the income of the legacy, unless the testator has provided another fund for his maintenance (*r*). But although the legacy in such a case bears interest from the testator's death, the legacy is not the less a contingent one, and the infant does not acquire an

(*o*) *Re* Holford, [1894] 3 Ch. 30; *Re* Jeffery, [1895] 2 Ch. 577.

(*p*) *Re* Judkin's Trusts, (1884) 25 C. D. 743, 749.

(*q*) *Re* Wells, (1889) 43 C. D. 281; and see Smith *v.* Cock, [1911] A. C. 317.

(*r*) *Re* George, (1877) 5 C. D. 837.

immediate vested interest in the income, and if he dies under twenty-one the surplus income not applied for maintenance does not pass to the infant's representatives (*s*).

A legacy made contingent upon an event having no reference to the infancy of the legatee, *e.g.*, upon attaining the age of thirty years, does not fall within the exception giving interest to an infant on a legacy from a parent or person *in loco parentis* (*t*).

Trustees in paying income for maintenance to parent must exercise discretion.

Where there is no absolute trust to apply income for maintenance, but merely a discretionary trust equivalent to a power, and the trustees, without exercising any discretion, pay over the income to the father of the infant child, he will be held liable to repay the whole amount received by him (*a*).

Court will not interfere with *bonâ fide* exercise of discretion.

In such a case, if the trustees, in the *bonâ fide* exercise of their discretion, refuse to make any allowance for maintenance, because they did not consider it necessary at present or for the true benefit of the infant, the Court will not interfere to overrule their discretion (*b*).

As to allowances for past maintenance, and maintenance out of capital.

The court will, under special circumstances, direct allowances for past maintenance, also maintenance out of capital, and will direct the application of capital for the advancement of infants (*c*), but executors should not incur the risk of acting in any of these respects, except under an order of the Court, notwithstanding the established principle that if an executor does, without application, what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application (*d*).

Jurisdiction as regards real estate.

With regard to real estate of an infant the Court has no jurisdiction to make an order having a wider effect than a judgment at law against the infant for necessaries would have. Therefore, although the Court may charge the

(*s*) *Re* Bowlby, [1904] 2 Ch. 685.
(*t*) *Re* Abrahams, [1911] 1 Ch. 108.
(*a*) Wilson *v.* Turner, (1883) 22 C. D 521.
(*b*) *Re* Bryant, [1894] 1 Ch. 323.
(*c*) See Williams (10th ed.) 1151 *et seq.*
(*d*) Lee *v.* Brown, (1798) 4 Ves. 362, 369.

expenses of the past maintenance of an infant on the *corpus* of an estate to which he is entitled in fee simple in possession (*e*), yet it has no jurisdiction to charge such expenses on a reversionary interest in real estate (*f*) or on the estate of an infant tenant in tail in possession (*g*), or in remainder, or on the base fee which might be created on the part of the infant (*h*). *A fortiori* there is no power to charge for future maintenance.

(*e*) *Re* Howarth, (1873) L. R. 8 Ch. 415.

(*f*) *Re* Badger, deceased, [1913] 1 Ch. 385.

(*g*) Cadman *v.* Cadman, (1886) 33 C. D. 397.

(*h*) *Re* Hamilton, (1885) 31 C. D. 291; *Re* Hambrough's Estate, [1909] 2 Ch. 620.

CHAPTER XLIII.

DESCRIPTION OF LEGATEES AND LEGACIES.

THE subject of the construction of Wills is not within the scope of this work, but it may be useful to state a few general rules, and in cases of difficulty the references will generally enable the reader to find the necessary information.

SECT. 1.—*Particular modes of Description of Legatees.*

"Children."

"Children."—This word, in its ordinary signification, and apart from the context of the Will, means legitimate children, and does not include grandchildren or other issue (*a*), but the context may show an intention to give it a wider signification (*b*).

Immediate gift to children as a class.

Where a bequest is immediate to "children" as a class, children in existence at the death of the testator, including children *en ventre sa mère*, alone are entitled (*c*).

Gifts at a future period.

A gift of a certain sum to each of a class of objects at a future period—*e.g.*, who shall live to attain the age of twenty-one years—is confined to those living at the testator's death (*d*). To admit objects born after the testator's death and before the period of distribution, the total amount of the gift must be independent of the number of objects among whom it is to be divided, and is therefore not increased by the construction adopted (*e*). Thus where the division of the fund among the legatees is deferred until a particular period after the testator's death—as to the children of A. when a child or children attain a particular age, or to be

(*a*) Williams (10th ed.) 853; Hawkins on Wills, 80, 85; *Re* Hopkins' Trusts, (1878) 9 C. D. 131, 137.

(*b*) *Re* Smith, (1887) 35 C. D. 558.

(*c*) Williams (10th ed.) 844.

(*d*) Rogers *v.* Mutch, (1878) 10 C. D. 25.

(*e*) Hawkins on Wills, 73; 2nd ed. 94.

divided amongst them at the death of B.—any child who falls under the description at the time when the fund is to be divided is entitled to a share, but no child born after the period of distribution has any claim (*f*).

Gift in remainder.

Where a particular estate or interest is given, with a gift over to the children of the person taking that interest, or the children of any other person, such gift over will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution (*g*).

Posthumous child.

Under a devise or bequest to the child of X., or to the children of X., as a class living or born at a particular time, a child *en ventre sa mère* at the time and afterwards born alive is a child entitled under the devise or bequest (*h*). The basis of the rule is that the potential existence of such a child places it within the reason and motive of the gift, and therefore it makes no difference to the application of the rule that the bequest is to children "born previously to the date of this my Will" (*i*). The rule is, however, limited to cases where such a construction is necessary for the benefit of the unborn child (*k*).

The above rules with regard to class gifts to children extend to gifts to grandchildren, issue, brothers, nephews, cousins, and similar class gifts (*l*).

Devise to a man and his children.

Where land is devised to a man and to his children, and he has no children at the time of the devise who could take concurrently with the parent, the parent takes a fee tail in the first instance transmitting it according to the law of descent to all his issue until they are exhausted; but if there had been children then in existence capable of taking at once concurrently with their parent, a fee simple would have been taken by the parent and the children concurrently, as

(*f*) Williams (10th ed.) 846; Andrews *v.* Partington, (1791) 3 Bro. C. C. 401; *Re* Knapp's Settlement, [1895] 1 Ch. 91.

(*g*) Jarman on Wills, (5th ed.) 1011.

(*h*) Villar *v.* Gilbey, [1906] 1 Ch. 583, 594, per Cozens-Hardy, L. J.; and see *Re* Salaman, [1908] 1 Ch. 4, 6.

(*i*) *Re* Salaman, *ubi sup.*

(*k*) Villar *v.* Gilbey, [1907] A. C. 139.

(*l*) Hawkins on Wills, 68; 2nd ed 90.

joint tenants (*m*). This rule, known as the rule in *Wild's Case*, has no application where the gift or devise to the children would, without reference to the rule, be a gift in succession to, and not concurrently with, their parent (*n*).

Legacy to a man and his children.

In a similar bequest of personal estate the parent takes an absolute interest where there have been no children at the date of the Will or the death of the testator ; but where there have been children living at the date of the Will or at the death of the testator they have been held to take the whole interest jointly with their parent. Slight circumstances, however, in the context, will justify the Court in holding that the parent shall take for life with remainder to his children (*o*).

Legitimacy.

The term " children " in a Will *primâ facie* means legitimate children, but illegitimate children may be included in the description by a sufficient indication of intention (*p*).

The rule extends to other blood relations not born in wedlock (*q*).

A bequest of personalty to the children of a foreigner means to his children whose legitimacy is established by the law of their father's domicil (*r*).

A gift to future illegitimate children, defined by reference to their paternity, will fail for uncertainty, as, in order to ascertain the persons, inquiries might be necessary, which the law forbids (*s*) ; but these considerations have no application to the case of the children of a female, and therefore a bequest to a woman's future illegitimate children is a good gift (*t*).

Presumption of marriage.

Where a man and woman are proved to have lived together as man and wife, the law will presume that they were

(*m*) Wild's Case, (1600) 6 Rep. 16 b, 17 b ; Clifford *v.* Koe, (1880) 5 App. Cas. 447, 453.

(*n*) *Re* Jones, [1910] 1 Ch. 167.

(*o*) Williams (10th ed.) 848 ; Newill *v.* Newill, (1872) L. R. 7 Ch. 253.

(*p*) Hill *v.* Crook, (1873) L. R. 6 H. L. 265 ; *Re* Humphries, (1883) 24 C. D. 691 ; Ebbern *v.* Fowler, [1909] 1 Ch. 578 ; *Re* Eve, [1909] 1 Ch. 796

(*q*) Seale-Hayne *v.* Jodrell, [1891] A. C. 304 ; *Re* Wood, [1902] 2 Ch. 542 ; *Re* Corsellis, [1906] 2 Ch. 316.

(*r*) *Re* Andros, (1883) 24 C. D. 637 ; and see *ante*, p. 168.

(*s*) See *ante*, p. 497.

(*t*) *Re* Loveland, [1906] 1 Ch. 542.

living together in consequence of a valid marriage, and that the offspring of the union are legitimate; and in order to rebut this presumption there must be strong, distinct, and satisfactory disproof (*u*). A marriage may be established by preponderating repute and by conduct even though the repute be divided (*x*).

"Descendants." "Descendants" means children and their children and their children to any degree, and it is difficult to conceive any context by which the word "descendants" could be limited to mean children only (*y*).

"Issue." "Issue" has the same meaning as descendants, but the meaning of the word may be limited by the context; and as a general rule, when there is a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word "issue" is cut down to mean children (*z*).

In a gift of personalty to A. and his issue, the word "issue" may be either a word of limitation, in which case A. would take absolutely, or a word of purchase, in which case the same question arises as in gifts to A. and his children, whether A. and his issue take jointly or whether the issue take subject to a life interest in A. (*a*).

Under a bequest to "issue" or "descendants" *simpliciter*, all those who answer the description will take *per capita* as joint tenants (*b*).

"Relations." "Relations."—This word is restricted to such relations as would have been entitled under the Statute of Distributions if the testator had died intestate, but the distribution must be *per capita* and not *per stirpes*, that is, the objects, but not the proportions, will be determined according to the statute. However, a gift of residue to be distributed "to my relatives,

(*u*) Piers *v.* Piers, (1849) 2 H. L. C. 331; *Re* Shephard, [1904] 1 Ch. 456.

(*x*) Lyle *v.* Ellwood, (1874) L. R. 19 Eq. 98.

(*y*) Ralph *v.* Carrick, (1879) 11 C. D. 873, 883, per James, L.J.; and see Williams (10th ed.) 875.

(*z*) Sibley *v.* Perry, (1802) 7 Ves. 522; Pruen *v.* Osborne, (1840) 11 Sim. 132; Ralph *v.* Carrick, *ubi sup.*; and see Williams (10th ed.) 870.

(*a*) See Theobald on Wills (7th ed.) p. 478, and *ante*, p. 624; and see *Re* Coulden, [1908] 1 Ch. 320. As to realty, see *Re* Simcoe, [1913] 1 Ch. 552.

(*b*) Davenport *v.* Hanbury, (1796) 3 Ves. 257; and see Williams (10th ed.) 1255, n. (*b*).

share and share alike, as the law directs," has been held to mean a distribution under the statute *per stirpes* and not *per capita* (*c*).

Under a bequest to " relations " only those can claim who are akin to the testator by blood, consequently a wife cannot claim as a relation of her husband, nor a husband as a relation of his wife (*d*).

" Poor relations."

A gift to " poor relations " is restricted to statutory next-of-kin, unless a perpetuity was intended and it can be construed as a charitable gift (*e*).

" Next-of-kin."

" Next-of-kin " (*f*).—If there is nothing to show that the testator had reference to the Statute of Distributions, or to a division as in the case of intestacy, the nearest of kin only are entitled (*g*). Hence a surviving brother will be entitled in exclusion of the children of a deceased brother or sister (*h*) ; and a father, mother, and child of the testator being equal in degree of proximity, will be entitled in joint tenancy (*i*).

Where there is a bequest to persons who would have been entitled under the Statute of Distributions, or to next-of-kin of the testator by reference to the statute, they take as if there had been an intestacy, and the shares are not taken in joint tenancy ; and as a general rule the class must be ascertained at the time of the testator's death notwithstanding that the bequest is preceded by a life interest in the legacy and that the life tenant is himself one of the next-of-kin, and that the words " then entitled " are used in describing the persons to take in the event which happened of the life tenant dying without issue (*k*).

(*c*) Williams (10th ed.) 878 ; Fielden *v.* Ashworth, (1875) L. R. 20 Eq. 410.

(*d*) Williams (10th ed.) 880 ; Worseley *v.* Johnson, (1753) 3 Atk. 758.

(*e*) Brunsden *v.* Woolridge, (1765) 1 Dick. 380 ; Widmore *v.* Woodroffe, (1766) Amb. 636, 640 ; Att.-Gen. *v.* Duke of Northumberland, (1878) 38 L. T. 345 ; Theobald on Wills (7th ed. p. 353.

(*f*) See Williams (10th ed.) 881 *et seq.*

(*g*) Smith *v.* Campbell, (1815) 19 Ves. 400, 404.

(*h*) Brandon *v.* Brandon, (1819) 3 Sw. 312 ; Elmsley *v.* Young, (1835) 2 M. & K. 780.

(*i*) Withy *v.* Mangles, (1843) 10 Cl. & F. 215 ; and see judgment of North, J., in *Re* Gray's Settlement, [1896] 2 Ch. 802, 804.

(*k*) Bullock *v.* Downes, (1860) 9 H. L. C. 1 ; *Re* Wilson, [1907] 2 Ch.

Under a bequest to the next-of-kin of a person who is dead at the date of the Will, if there is nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who, at the testator's death, are the next-of-kin of the deceased person named in the Will, will be the persons to take (*l*).

If there is no reference to the statutory mode of distribution, but the statute is merely referred to to define the class, *e.g.*, " for and equally between the persons who at my death shall be my next-of-kin according to the statutes for the distribution of the estates of intestates," the word " equally " must have its full effect and the statutory next-of-kin take *per capita* (*m*).

" Family.' " Family."—Under a gift by a married man to his family, his children, if any living, alone take to the exclusion of other descendants (*n*) and of his wife (*o*).

" Wife." " Wife."—*Primâ facie* where the wife of a person is spoken of by a testator and that person is married at the date of the Will, in the absence of any context the wife existing at the date of the Will is the person intended to take, to the exclusion of a second wife (*p*). But if the person was not married at the date of the Will, or at the death of the testator, the legacy vests in the person who first answers the description (*q*).

A gift by a testator to his wife or to the wife of another means *primâ facie* his lawful wife, but it may appear that the testator used the description in a secondary sense as meaning the woman reputed as being his wife, though not in fact (*r*) ; or that the word " wife " was not such a part of the description as to amount to a condition that she should not take

572 ; *Re* Nightingale, [1909] 1 Ch. 385 ; *Re* Winn, [1910] 1 Ch. 278.

(*l*) Wharton *v.* Barker, (1858) 4 K. & J. 483, 502 ; *Re* Rees, (1890) 44 C. D. 484.

(*m*) *Re* Richards, [1910] 2 Ch. 74.

(*n*) Pigg *v.* Clarke, (1876) 3 C. D. 672.

(*o*) *Re* Hutchinson and Tenant, (1878) 8 C. D. 540.

(*p*) *Re* Drew, [1899] 1 Ch. 336 ; *Re* Coley, [1903] 2 Ch. 101.

(*q*) Peppin *v.* Bickford, (1797) 3 Ves. 570 ; Radford *v.* Willis, (1871) L. R. 7 Ch. 7.

(*r*) *Re* Wagstaff, [1907] 2 Ch. 35, and (C. A.), [1908] 1 Ch. 162.

unless she filled the character of wife, as in the case of a subsequent divorce (*s*); or that the description is given for the purpose of ascertaining and identifying the individual named (*t*). In such cases the expression "during her widowhood" simply describes the time during which she is to enjoy the gift (*u*).

"Husband."

"Husband."—Similar principles apply as in the case of "wife" (*x*).

When a legacy is given to a person, under a particular character, which has been falsely assumed, and which alone can be supposed the motive of the bounty, the Court of Probate is the only Court which can listen to the allegation that the Will was obtained by fraud (*y*).

"Unmarried."

"Unmarried" primarily means "without ever having been married," that is, a bachelor or spinster, but the context may show a secondary meaning, namely, not having a wife or husband, as the case may be (*z*).

"Heir."

Where the word "heir" is used, not to denote succession or substitution but to describe a legatee (*e.g.*, "to my heir"), there is no reason to depart from the natural or ordinary sense of the word (*a*). On the other hand, where the word "heir" is used to denote succession or substitution, it may, according to the context, be construed to mean such person or persons as would legally succeed according to the nature and quality of the property, that is, the heir as to real estate, and next-of-kin as to personal estate (*b*). Where, however, personal estate is given with words of limitation which if applied to real estate would create an estate in fee simple or fee tail, the legatee will take absolutely (*c*).

(*s*) *Re* Boddington, (1884) 25 C. D. 685; see also *Re* Horner, (1887) 37 C. D. 695.

(*t*) Anderson *v.* Berkley, [1902] 1 Ch. 936.

(*u*) *Re* Hammond, [1911] 2 Ch. 342.

(*x*) Radford *v.* Willis, *ubi sup.*

(*y*) Meluish *v.* Milton, (1876) 3 C. D. 27.

(*z*) *Re* Chant, [1900] 2 Ch. 345; and see *Re* Brydone's Settlement, [1903] 2 Ch. 84.

(*a*) De Beauvoir *v.* De Beauvoir (1846) 3 H. L. C. 524.

(*b*) Keay *v.* Boulton, (1883) 25 C. D. 212.

(*c*) Crawford *v.* Trotter, (1819) 4 Madd. 361; Appleton *v.* Rowley, (1869) L. R. 8 Eq. 139, 145; and see Williams (10th ed.) 866.

"Eldest son." "Younger children."

In a settlement where there is a clause excluding the eldest son from the benefit of a fund provided for children other than an eldest son, the time for ascertaining who fills the character of eldest son is the period fixed by the settlement for the distribution of the fund (*d*). But where there is no overriding or paramount intention to make provision for the children generally it would seem this principle does not apply (*e*).

"Nephews and nieces."

"Nephews and nieces" mean *primâ facie* the children of a brother or the children of a sister, whether of the whole or half blood, and apart from the context they do not include more remote descendants (*f*).

"Cousins."

The tendency of later decisions has been to give to the word "cousin" its strict meaning as being a child of an uncle or aunt, and implying consanguinity, unless there is no person of the class (*g*). In a case where neither claimant was accurately described, it was held that the wife of a cousin might be popularly called a cousin (*h*).

Servants.

A bequest to servants of a year's wages does not extend to servants employed at wages calculated by the week or month, where the testator had several classes employed at yearly, weekly, and monthly wages respectively (*i*).

"Representatives."

The word "representatives" *primâ facie* means legal personal representatives, or executors or administrators; but it is a flexible term, and on the construction of the Will it may mean either the next-of-kin or the descendants of the person referred to (*k*). But where the gift is to a person and his executors or administrators or representatives, the words added are merely words of limitation, and the legatee takes abso-

(*d*) Collingwood *v.* Stanhope, (1869) L. R. 4 H. L. 43; and see *Re* Stawell's Trusts, [1909] 1 Ch. 534, reversed by C. A. on other grounds, [1909] 2 Ch. 239; *Re* Wise's Settlement, [1913] 1 Ch. 41.

(*e*) Law Union and Crown Insurance Co. *v.* Hill, [1902] A. C. 263.

(*f*) *Re* Blower's Trusts, (1871) L. R. 6 Ch. 351; *Re* Cozens, [1903] 1 Ch. 138.

(*g*) Wilks *v.* Bannister, (1885) 30 C. D. 512, 517.

(*h*) *Re* Taylor, (1886) 34 C. D. 255.

(*i*) *Re* Ravensworth, [1905] 2 Ch. 1, following Blackwell *v.* Pennant, (1852) 9 Hare, 551; but see *Re* Sheffield (Earl), [1911] 2 Ch. 267.

(*k*) *Re* Horner, (1887) 37 C. D. 695.

lutely, and consequently should the legatee die in the lifetime of the testator the legacy will lapse (*l*).

SECT. 2.—*Particular Modes of Description of Legacies.*

"Effects."

Under a bequest of "all my plate, linen, furniture, and other effects," apart from any context to the contrary, the legatee will be entitled to the whole of the residuary personal estate. The words "other effects" are not to be cut down so as to mean that which is something like furniture, plate, or linen, on the principle of *ejusdem generis* (*m*).

The word "effects" will not *per se* include real estate, and the use of the word "devise" is not enough to give to "effects" a more extended meaning, but the whole context may show that the more extended meaning to include all property, whether real or personal, was intended (*n*).

"Goods and chattels."

The word "goods," and equally the word "chattels," taken simply and without qualification comprise the whole personal estate of every description (*o*).

"Household goods."

By the term "household goods" everything of a permanent nature, *i.e.*, articles of household use which are not consumed in their enjoyment, that were used in, or purchased, or otherwise acquired by a testator, for his house, including plate, will pass to the legatee; but not goods in the way of the testator's trade or business, nor sporting guns (*p*).

"Household furniture."

By the term "household furniture" all personal chattels will pass which may contribute to the use or convenience of the householder, or the ornament of the house, as plate, linen, china, both useful and ornamental, and pictures (*q*); but not furniture in the possession of the testator in the way of his trade only and not reserved for his domestic or personal

(*l*) Appleton *v.* Rowley, (1869) L. R. 8 Eq. 139; *Re* Currie's Settlement, [1910] 1 Ch. 329, 333.

(*m*) Hodgson *v.* Jex, (1876) 2 C. D. 122; In the Goods of Jupp, [1891] P. 300.

(*n*) Smyth *v.* Smyth, (1878) 8 C. D. 561; Hall *v.* Hall, [1892] 1 Ch. 361.

(*o*) Kendall *v.* Kendall, (1828) 4 Russ. 360, 370; and see *Re* Prater, (1888) 37 C. D. 481, 487; and *Re* Robson, [1891] 2 Ch. 559, 564.

(*p*) Williams (10th ed.) 930.

(*q*) Williams (10th ed.) 933, and see Cremorne *v.* Antrobus, (1828) 5 Russ. 312.

use (*r*) ; nor books unless there are special circumstances (*s*), as if the exclusion of a library would be to dismantle the house which is to be kept up for the family (*t*) ; nor wines (*u*), nor as a general rule tenant's fixtures, whether used in a private residence (*x*) or for trade purposes (*y*).

"Plate." "Plate," properly so called, does not include plated articles ; but both will pass under a gift of all the furniture in the house, and an exception of "plate" will extend only to plate properly so called, that is to silver articles (*z*).

"Stock on farm." Growing crops will pass under a gift of stock on a farm as against the devisee of the land (*a*).

"Moneys." The word "moneys," *primâ facie*, will be confined to ready money actually in hand, but a different intention may be gathered from the words of the Will (*b*). There are cases in which it has been held that the word "money" means the general estate or the residuary personal estate of the testator, as where the gift is in the form of money remaining after payment of debts and funeral and testamentary expenses (*c*), or a pecuniary legacy (*d*).

"Ready money." Where the bequest is of "ready money," money on deposit at a testator's bank subject to more than twenty-four hours' notice of withdrawal will not pass (*e*). But money on deposit at a testator's bank, whether notice of withdrawal is or is not required, will pass under a bequest of "moneys owing to me at the time of my decease" (*f*).

"Securities." In the absence of any context or admissible evidence to the contrary, the word "securities" will be confined to money

(*r*) Manning *v.* Purcell, (1855) 7 De G. M. & G. 55.

(*s*) Cremorne *v.* Antrobus, *ubi sup.*

(*t*) Ouseley *v.* Anstruther, (1847) 10 Beav. 462.

(*u*) Porter *v.* Tournay, (1797) 3 Ves. 311.

(*x*) Finney *v.* Grice, (1878) 10 C. D. 13.

(*y*) *Re* Seton-Smith, [1902] 1 Ch. 717.

(*z*) Holden *v.* Ramsbottom, (1863) 4 Giff. 205.

(*a*) *Re* Roose, (1880) 17 C. D. 696.

(*b*) Langdale *v.* Whitfield, (1858) 4 K. & J. 426, 432 ; Williams *v.* Williams, (1878) 8 C. D. 789.

(*c*) *Re* Smith, (1889) 42 C. D. 302 ; *Re* Egan, [1899] 1 Ch. 688.

(*d*) In the Goods of Bramley, [1902] P. 106.

(*e*) *Re* Wheeler, [1904] 2 Ch. 66 ; *Re* Price, [1905] 2 Ch. 55, 56. Cf. *Re* Windsor, (1913) W. N. 176, as to money orders.

(*f*) *Re* Derbyshire, [1906] 1 Ch. 135.

secured on property. But the word is a flexible one and is widely used as a synonym for "investments," and the Will may show that the testator so used the word, in which case it will include stocks and shares in companies (*g*).

Sect. 3.—*Errors in Names or Descriptions of Legatees and Legacies.*

The true intention of the testator may be ascertained either by the context or by evidence of surrounding circumstances.

Error in name.

Error in description.

Omission of name.

Mistake in number of class.

An error in the name, and even in the name and sex, of the legatee may be set right by the accuracy of the description; so an error in the description may be set right by the certainty of the name (*h*). Also the omission of a name or a mistake in the number of a class may be supplied by the context (*i*). Where the error is in the number of a class the rule is that if the actual number is larger than is stated the larger number take (*k*). The principle also applies to the converse case where the number of the children in existence is less than that specified in the Will (*l*).

Evidence of circumstances and state of testator's family.

Evidence is admissible of the circumstances, the habits, and the state of the testator's family at the time he made his Will, so as to put the Court in the position of the testator, in order to ascertain the bearing and the application of the language which he uses, and whether there exists any person or thing to which the whole description given in the Will can be, with sufficient certainty, applied. Evidence of the declarations of a testator as to whom he intended to benefit, or supposed that he had benefited, will be received when the description of the legatee, or the thing bequeathed, is equally applicable, in all its parts, to two persons or to two things (*m*).

Declarations of testator except in cases of equivocation inadmissible.

(*g*) *Re* Rayner, [1904] 1 Ch. 176; *Re* Gent and Eason's Contract, [1905] 1 Ch. 386.

(*h*) Williams (10th ed.) 903, and cases cited; and see judgment of Fry, J., in Garland *v.* Beverley, (1878) 9 C. D. 213, 216.

(*i*) Williams (10th ed.) 904, 909, and cases cited.

(*k*) Garvey *v.* Hibbert, (1812) 19 Ves. 125; Newman *v.* Piercey, (1876) 4 C. D. 41; *Re* Groom, [1897] 2 Ch. 407; *Re* Sharp, [1908] 1 Ch. 372.

(*l*) *Re* Sharp, *ubi sup.*, affirmed [1908] 2 Ch. 190.

(*m*) Charter *v.* Charter, (1874) L. R.

Moreover, where it is proved that there is no person or object answering the description of the words used, according to their strict tenor—as where the gift was to the testator's grandnephew Robert and he had no grandnephew Robert but had a grandnephew Richard—evidence is admissible not only to show that the testator has been in the habit of calling a person or object by the wrong name, but the Court may look at any document, substantially contemporaneous, including the testator's written instructions to his solicitors for his Will, to identify the person or object who has been misdescribed (*n*).

Similar rules apply with regard to construction and the admissibility of extrinsic evidence to ascertain the subject matter devised or bequeathed as to ascertain the person intended to be benefited (*o*).

Evidence of amount of property at date of Will.

Evidence of the amount of a testator's personal estate at the time of making his Will is, in general, inadmissible, since the Will speaks from the death of the testator, and consequently its amount at the date of the Will could not in general form a just ground of inference as to the meaning of the testator's words. But such evidence may be material and admissible under special circumstances, as where the testator meant to give a species of stock, but the description of the subject is not intelligible on the face of the Will, or where it is apparent that the testator has made a wrong calculation of the value of his fortune, showing thereby that it was with reference to the actual state of his property that the bequests were made (*p*).

Falsa demonstratio.

Where there is a subject-matter to which all the terms of the description apply, no part of them can be rejected as *falsa demonstratio*. The words of the Will must first be construed,

7 H. L. 364; and see *Re* Grainger, [1900] 2 Ch. 756; [1902] A. C. 1, where the admissibility of extrinsic evidence in aid of the interpretation of Wills is discussed.

(*n*) *Re* Ofner, [1909] 1 Ch. 60; *Re* Halston, [1912] 1 Ch. 435.

(*o*) Numerous instances and cases are given in Williams (10th ed.) 927—954; and as to the principles on which the Court acts in supplying, by inference, an omission in a will, see Mellor *v.* Daintree, (1886) 33 C. D. 198.

(*p*) *Re* Grainger, [1900] 2 Ch. 756, 768, per Rigby, L.J.

and then the extrinsic evidence may be looked at to see whether there is anything which those words fit. Where there is no subject-matter to which all the testator's words apply, the Court has to consider on the evidence what is the substance of his gift (*q*).

Erroneous recital.

Where a testator erroneously recites that a legatee owes him a particular sum or advance, and directs the legatee to bring that sum or the sum "hereinbefore recited to have been advanced" into hotchpot, or otherwise shows an intention to charge the legatee with the sum mentioned, that sum, whether due or not, must be brought into hotchpot. But if the testator merely directs the alleged advance "or so much thereof as shall remain unpaid" at his death, or at the time of distribution, to be brought into hotchpot, he *primâ facie* intends the amount actually due, and not the alleged advance less repayments, to be brought into hotchpot (*r*).

(*q*) *Re* Seal, [1894] 1 Ch. 316.

(*r*) *Re* Kelsey, [1905] 2 Ch. 465.

CHAPTER XLIV.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR TO ACCOUNT.

Executor or administrator must account for all profit out of the estate of the deceased.

Also for profit arising from his office.

An executor or administrator must account for all profits which have accrued in his own time, either spontaneously, or by his acts, out of the estate of the deceased (*a*).

So also if he make a profit from his office, as, for instance, being appointed executor and trustee, he subsequently retires from the trust in consideration of a money payment to enable another to be appointed in his place, the sum paid to him shall form part of the testator's assets for which he must account (*b*).

It would seem, however, that where a shareholder in a company in respect of shares held by him as trustee is thereby qualified to act, and acts as director of the company, his remuneration as director is not a profit made from his office of trustee, and he is under no liability to account (*c*).

He cannot purchase any part of assets.

Nor can an executor or administrator be allowed, either immediately or by means of a trustee, to be a purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*d*).

On violation of duty he is charged with all losses and must account for all profit.

Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behalf, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. All losses are

(*a*) Williams (10th ed.) 1482.

(*b*) Sugden *v.* Crossland, (1856) 3 Sm. & G. 192.

(*c*) *Re* Dover Coalfield Extension Ltd., [1908] 1 Ch. 65.

(*d*) Williams (10th ed.) 1487, and see *ante*, p. 244.

charged on the wrongdoer, while no profit can ever accrue to him (*e*).

For breach of trust he and all accomplices are severally liable.

If an executor or administrator commits a breach of trust, he and all those who are accomplices with him in that breach of trust are all and each of them bound to make good the trust funds and interest (*f*).

But a stranger who acts as the agent of the trustee and confines himself to the duties of an agent is not to be responsible as a constructive trustee, *i.e.*, a trustee *de son tort*, unless some of the property passes into his hands or under his control and he mixes himself up with a breach of trust, being cognisant of an improper design on the part of the trustee (*g*).

Breach of trust in carrying on business.

If the breach of trust consists in embarking or investing the trust money in business, he must account for the profits made by him by such employment in business ; or at the option of the *cestui que trust*, or if it does not appear, or cannot be made to appear, what profits are attributable to such employment, he must account for trade interest, that is to say, interest at 5 per cent. (*h*). But as to a partnership business a general decree for an account of the profits of the business cannot be made in the absence of some of the surviving partners, and one surviving partner being an executor or administrator cannot, it would seem, be made answerable for the whole of the profits made in trade by the employment of the capital of the testator or intestate without justification, those profits having been received not merely by the executor or administrator but by other partners, without bringing all the partners before the Court, and subjecting them to any liability under the decree (*i*).

Rule as to election between interest and share of profits.

If the beneficiaries repudiate the arrangement by which the personal representative of the deceased wrongfully employed money in partnership, it may be inferred from the

(*e*) Per Ld. Brougham in Docker *v.* Somes, (1834) 2 My. & K. 655, 664.

(*f*) Vyse *v.* Foster, (1872) L. R. 8 Ch. 309, 329, per James, L.J.

(*g*) Barnes *v.* Addy, (1874) L. R. 9 Ch. 244 ; *Re* Barney, [1892] 2 Ch. 265.

(*h*) Vyse *v.* Foster, *ubi sup.*

(*i*) Vyse *v.* Foster, L. R. 7 H. L. 318, 334, per Ld. Cairns ; and see Flockton *v.* Bunning, (1864) in note to Vyse *v.* Foster, L. R. 8 Ch. 323.

judgment in *Jones* v. *Foxall* (*k*) that they would have to elect between interest and that share only of the profits made in respect of the capital which actually came into his hands.

The rule, however, as to election between interest and profits would seem to be inapplicable to the case of an actual loan by a trustee in breach of trust to himself and others (*l*).

Where a trustee has mixed trust funds with his private money, and has employed both in a trade or adventure of his own, the *cestui que trust*, if he prefers to insist on profits instead of interest, can only insist on a proportionate share attributable to such employment (*m*).

Interest on balances retained.

With regard to charging the personal representative with interest the rule is stated as follows by Sir John Romilly in *Jones* v. *Foxall* (*n*)—"Generally, it may be stated, that if an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at 4 per cent. on these balances; if, in addition to such retention, he has committed a direct breach of trust, or if the fund had been taken by him from a proper state of investment in which it was producing 5 per cent., he will be charged with interest after the rate of 5 per cent. per annum; if, in addition to this, he has employed the money so obtained by him in trade speculation, for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at 5 per cent. per annum, and also with yearly rests, that is, with compound interest."

So in *Attorney-General* v. *Alford* (*o*) an executor and trustee, who had for several years retained funds in his hands uninvested which he ought to have invested, was held not to be chargeable with interest at 5 per cent. or upon the principle of annual rests, but with simple interest only at 4 per

(*k*) (1852) 15 Beav. 388, but the authority of this case to its circumstances was questioned by Ld. Selborne in Vyse *v.* Foster, *ubi sup.*, at p. 345.

(*l*) See observations of Ld. Selborne, *ibid.*

(*m*) Docker *v.* Somes, (1834) 2 My. & K. 655; Wedderburn *v.* Wedderburn, (1838) 4 My. & Cr. 41.

(*n*) (1852) 15 Beav. 388.

(*o*) (1855) 4 De G. M. & G. 843.

cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct, and Lord Cranworth observed : " What the Court ought to do, I think, is to charge him only with the interest which he has received or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it."

Where personal representatives are liable to be charged with interest on sums improperly paid or improperly retained by them, it makes no difference that they acted *bonâ fide* and distributed the assets upon what turns out to be an erroneous construction of the Will (*p*). But in order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount. Where the total balance retained arising from personal estate amounted to less than £96, and the total share of rents of leasehold estate a little more than £88, and the testatrix died in 1823, and the bill was filed in 1842 in which the plaintiff, who was in a position to ask for accounts long before, claimed interest on balances, he was held not entitled (*q*).

No interest charged on balance found due in consequence of items disallowed,

An executor or administrator who, acting honestly, makes payments which are disallowed in taking his accounts, and balances are in consequence found due from him which are ordered to be paid into Court, will not be chargeable with interest thereon (*r*).

nor on arrears of income unpaid to a life tenant.

The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid to a life tenant (*s*).

Compound interest.

Although as a general rule only simple interest is charged on balances in hand, yet where there is an express trust for accumulation, compound interest upon such balances will be chargeable (*t*).

Order on further consideration as

In a proper case it is competent for the Court, upon the

(*p*) *Re* Hulkes, (1886) 33 C. D. 552.
(*q*) Miles *v.* Durnford, (1852) 2 Sim. (N. S.) 241.
(*r*) *Re* Jones, [1897] 2 Ch. 190, 199.
(*s*) Blogg *v.* Johnson, (1867) L. R. 2 Ch. 225.
(*t*) *Re* Barclay, [1899] 1 Ch. 674.

to interest without wilful default being charged.

further consideration of an action, to charge interest, whether simple or compound, on such balances, although no case of wilful default was raised by the pleadings and the question of interest was not referred to in the judgment (*u*).

Principle upon which interest is computed.

Where money is retained in the hands of trustees and made use of by them, the Court presumes the rate of interest made upon the money to be the ordinary rate of interest, namely, 5 per cent. The Court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money by directing rests or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, 5 per cent. or compound interest as the case may be. If the Court finds that the money received has been invested in an ordinary trade, it will presume that the party against whom relief is sought has made the amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made. But a solicitor's business is not such a business. A solicitor's profit arises from the time and the labour which he bestows upon cases in which he is engaged. There is nothing like compound interest obtained upon the money employed by a solicitor. On the contrary, he is frequently out of pocket for a considerable period by the moneys he expends and upon which he receives no interest. It was accordingly held that in such a case no profit can be necessarily inferred, and consequently compound interest ought not to be directed (*x*).

Rate of interest charged.

In charging interest on balances in hand according to the practice now adopted, the rate is 3 per cent. instead of 4 per cent. (*y*).

It would seem that the same rate is now chargeable in the case of a direct breach of trust in investing in unauthorised investments, since it must be treated as if it had not been made and the trust money had remained in hand uninvested (*z*).

(*u*) *Re* Barclay, [1899] 1 Ch. 674.
(*x*) Burdick *v.* Garrick, (1870) L. R. 5 Ch. 233, 241.
(*y*) *Re* Barclay, *ubi sup.*
(*z*) *Ibid.*, and see Wyman *v.* Paterson, [1900] A. C. 271.

Where trust money is wrongfully employed in trade or speculative transactions, and the *cestui que trust* elects to charge interest instead of having an account of profits, the rate is still 5 per cent. (*a*).

Allowances.

As to what allowances the personal representative will be entitled to in accounting—

Reasonable expenses.

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office except those which arise from his own default (*b*). And Ord. 33, r. 8, of R. S. C. provides that in taking any account by any judgment or order all just allowances shall be made without any direction for that purpose.

No allowance for personal trouble or loss of time.

It is a general principle that an executor or administrator shall have no allowance for personal trouble and loss of time in the execution of his duties (*c*). The Will, however, under which the executor is appointed may make provision for his remuneration ; but such a clause being in effect a legacy he cannot claim it as against creditors if the estate should prove insolvent (*d*).

No person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing no improper charges are made (*e*). The principle is based upon the consideration that the Court of Equity will not allow a man to place himself in a position in which his interest and duty are in conflict (*f*). So an executor or administrator a member of a banking firm cannot charge banker's commission paid to the bank against the estate (*g*), nor being an auctioneer can he charge commission on sale of assets (*h*). This principle applies not only in the case of one trustee, but to the case where he is a partner with others,

Principle applies to firm of which trustee is partner.

(*a*) *Re* Davis, [1902] 2 Ch. 314.
(*b*) Williams (10th ed.) 1574.
(*c*) *Ibid.*, 1497.
(*d*) *Re* White, [1898] 1 Ch. 297 ; 2 Ch. 217.
(*e*) Broughton *v.* Broughton, (1856) 5 De G. M. & G. 160, per Ld. Cranworth.
(*f*) *R* Barber, (1886) 34 C. D. 77, 81, per Chitty, J.
(*g*) Heighington *v.* Grant, (1840) 5 My. & Cr. 258, 262.
(*h*) Kirkman *v.* Booth, (1848) 11 Beav. 273 ; Matthison *v.* Clarke, (1855) 3 Drew, 3.

and the charge is made by the partnership (*i*). But in the absence of special circumstances it does not apply to individual members of a board of directors of a company which has been appointed to act as agent in the management of an estate at a remuneration, upon the broad principle that directors stand in a fiduciary position only to the company (*k*).

Rules applicable to solicitor, executor or administrator.

In respect of this general principle, a solicitor, executor or administrator, is in the same position as a broker, commission agent, or the like. He is allowed his costs out of pocket, that is to say, the expenditure, but not anything for his time or trouble (*l*).

In the absence of any provision to the contrary in the Will the following rules apply to a solicitor-executor, and also to a solicitor-administrator.

The general rule is he cannot make any profit as a solicitor on business which is done by himself or by the firm of which he is a member in matters relating to the estate. If there is business which a layman cannot properly perform he may employ a solicitor to do that legal business ; but if he chooses to do the work himself he cannot make a charge against the estate. This is the rule as regards work done out of Court by a trustee, whether acting for himself or for the other trustee as well (*m*).

The same rule applies where the solicitor does business in Court for himself as solicitor, where he is plaintiff in an action and also where he is the defendant (*n*), but subject to the one exception established by *Cradock* v. *Piper* (*o*), that where there is work done in a suit not on behalf of the trustee, who is a solicitor, alone, but on behalf of himself and a co-trustee, the rule will not prevent the solicitor or his firm from receiving the usual costs, if the costs of appearing for and acting for the two have not increased the expense. This exception is limited to the costs incurred in respect of business done in an

Only exception to general rule.

(*i*) Matthison *v.* Clarke, *ubi sup.*
(*k*) Bath *v.* Standard Land Co., Ltd. [1911] 1 Ch. 618.
(*l*) *Re* Barber, *ubi sup.*, at p. 81.
(*m*) *Re* Corsellis, (1887) 34 C. D. 675, 681, per Cotton, L.J.
(*n*) *Re* Barber, *ubi sup.*, at p. 81.
(*o*) (1849) 1 Mac. & G. 664.

action or a suit; but it is immaterial whether the costs are incurred in a hostile action, or in friendly proceedings in chambers such as an application for maintenance of an infant (*p*).

Solicitor employing town agent.

An executor or administrator who acts as solicitor in a cause in which he is a party in his representative character, though he is only allowed personally, as against the estate, such costs as he actually pays, yet when he employs a town agent he is entitled to be allowed, as against the estate, that proportion of the whole costs which his town agent in the cause is entitled to receive (*q*).

Effect of acting for *cestui que trust* in action.

The solicitor-trustee who acts as solicitor for *cestuis que trust* in an action is not deprived of his proper bill of costs by reason of his also being a trustee, because that is not part of the business of the trust property so-called (*r*). But it is wrong for a trustee who is a solicitor to act in proceedings for a person who occupies an adverse position, for instance a receiver appointed in the administration proceedings, not on the ground that he is making a profit by his trusteeship, but because he is putting himself into a position adverse to the estate of which he is a trustee, a position inconsistent with the due discharge of his duty to the estate, which is to get everything he can from the receiver, and to obtain the disallowance of any payments by the receiver to which he is not legally entitled, and in such a case he and his firm on taxation ought to be disallowed any profit costs in so acting (*s*).

Profit made by solicitor or his firm in contravention of rules to be accounted for to the estate.

Where a trustee makes profits in contravention of the above rules he must account for such profits to the estate. For instance a solicitor-trustee, and the firm of which he is a member, making profit costs in preparing leases and agreements for leases of portions of the trust estate, must account to the estate for such costs, although paid by the lessees (*t*).

So where a solicitor-trustee, not being solicitor on the record for any party, received a commission from a London

(*p*) *Re* Corsellis, (1887) 34 C. D. 675.
(*q*) Burge *v.* Brutton, (1843) 2 Hare, 373.
(*r*) *Re* Barber, (1886) 34 C. D. 77, 81.
(*s*) *Re* Corsellis, *ubi sup.*
(*t*) *Ibid.*

firm on business introduced by him connected with the trust, it was held that he was accountable to the trust estate for such profit, as having been made either directly or indirectly through his office of trustee (*u*).

Solicitor-trustee, steward of manor not liable to account.

But where the partner of a solicitor-trustee was appointed steward of a manor which formed part of the trust estate, and fees for manorial business were paid to the steward by the tenants and brought into the partnership account, it was held that such fees, not being received by the steward in his character as solicitor, were not liable to be accounted for to the trust estate (*x*).

What are "usual professional charges" under authority to charge in Will.

A direction in a Will that a solicitor-executor should make "the usual professional charges" does not entitle him to charge items which are not of a strictly professional character, and could have been transacted by a lay executor without the assistance of a solicitor (*y*), although as against a client who was not a trustee he might have charged for such work (*z*). The Will, however, may authorise charges for business not strictly professional which might have been performed in person by a trustee not being a solicitor, and in that case such items will be allowed (*a*).

There is no jurisdiction on summons in an administration action to order a defendant trustee, being a solicitor, to pay into Court profit costs wrongly received by him, but he must be made to account in a separate action (*b*).

Effect of the Judicial Trustees Act, 1896.

The Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 1 (5), provides that "There may be paid to a judicial trustee out of the trust property such remuneration not exceeding the prescribed limits, as the Court may assign in each case, subject to any rules under this Act respecting the application of such remuneration where the judicial trustee is an official of the Court, and the remuneration so assigned to any judicial trustee shall, save as the Court may for special

(*u*) Vipont *v.* Butler, (1893) W. N. 64.

(*x*) *Re Corsellis, ubi sup.*

(*y*) *Re* Chapple, (1884) 27 C. D 584.

(*z*) *Re* Chalinder & Herrington, [1907] 1 Ch. 58.

(*a*) *Re* Fish, [1893] 2 Ch. 413.

(*b*) *Re* Thorpe, [1891] 2 Ch. 360.

reasons otherwise order, cover all his work and personal outlay."

The administration of the property of a deceased person, whether a testator or intestate, is a trust, and the executor or administrator a trustee, within the meaning of this Act (*c*). By r. 25, made in pursuance of s. 4, any person who is an executor or administrator may be appointed a judicial trustee for the purpose of the collection and distribution of the estate of a deceased person in the same manner and subject to the same provisions as a person may be appointed judicial trustee of a trust.

Apart from this Act Court has sometimes allowed remuneration.

Apart, however, from this Act the Court has in some cases allowed a personal representative to be remunerated, *e.g.*, where the trustee had during the life of the testator the principal and confidential management of his estate, and it was for the benefit of the estate he should continue a trustee (*d*). So when the firm of which the executor was a partner had been consignees, employed by the testator, of his West India estates, and they were continued as consignees and allowed to charge (*e*). But as a general rule commissions on remittances from the East and West Indies were allowed to be retained only so long as the trustee was actually there discharging his duty, and not after his return to this country (*f*).

Proper payments to agents will be allowed.

When an executor or administrator is justified in employing an agent he will be allowed all proper payments made to the agent for his trouble, and it follows that where he is not justified in employing an agent he will not be allowed any payment to the agent for what he ought to have done himself (*g*).

Instances of proper employment of agents.

For instance he is entitled to employ and pay an agent for collecting weekly rents, notwithstanding by the Will he is given a recompense for his trouble in the execution of his office (*h*), or to get in debts (*i*), or a stockbroker to identify a

(*c*) See s. 1 (2), and *Re* Ratcliff, [1898] 2 Ch. 352.

(*d*) Marshall *v.* Holloway (1818) 2 Swan. 432, 453.

(*e*) Morison *v.* Morison, (1838) 4 My. & Cr. 215.

(*f*) Williams (10th ed.) 1504.

(*g*) Weiss *v.* Dill, (1834) 3 My. & K. 26.

(*h*) Wilkinson *v.* Wilkinson, (1825) 2 S. & S. 237.

(*i*) Hopkinson *v.* Roe, (1838) 1 Beav. 180.

legatee at the bank on a transfer of stock (*j*). So also it is not absolutely necessary for an executor or administrator to go to the bank to transfer stock, but he would not be entitled to charge for power of attorney if he could, without inconvenience and expense, personally attend (*k*). So also if the nature of the accounts justify it he may employ and pay an accountant (*l*).

So also he may employ a solicitor, but he may not employ a solicitor and charge the estate for doing those ordinary things which he ought to do himself, as, for instance, writing an ordinary letter (*m*) ; and the amount paid by him on the solicitor's bill, without being first taxed, may be questioned by the beneficiary and moderated by the Master as against the personal representative by a deduction from charges (*n*). Moreover the beneficiary as a party interested (*o*) may, under s. 39 of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), either before payment or within twelve calendar months after payment, apply for an order to have the bill taxed as against the solicitor. Further, the amount of costs allowed by a Taxing Master as between the client and his solicitor is not conclusive of the amount which the Court will allow out of the estate, since costs which an executor or administrator may be bound to pay to his own solicitor may be very improper costs as against the trust estate (*p*).

A direction in a Will to employ, or appointing, a particular person as solicitor or agent to the trust estate, does not impose any trust or duty on the executors or trustees to give effect to the direction (*q*).

(*j*) Jones *v.* Powell, (1843) 6 Beav. 488 ; Davenport *v.* Powell, (1844) 14 Sim. 275.

(*k*) Harbin *v.* Darby, (1860) 28 Beav. 325.

(*l*) Henderson *v.* McIver, (1818) 3 Madd. 275.

(*m*) Harbin *v.* Darby, *ubi sup.*

(*n*) Johnson *v.* Telford, (1827) 3 Russ. 477 ; Allen *v.* Jarvis, (1869) L. R. 4 Ch. 616 ; and see *Re* Park, (1889) 41 C. D. 326.

(*o*) A creditor who has obtained judgment for the administration of the estate of a deceased testator is also "a party interested" within the meaning of s. 39 : *Re* Jones & Everett, [1904] 2 Ch. 363.

(*p*) Brown *v.* Burdett, (1888) 40 C. D. 244 ; and cf. *Re* Longbotham & Sons, [1904] 2 Ch. 152, and *Re* Cohen, [1905] 2 Ch. 137.

(*q*) Foster *v.* Elsley, (1881) 19 C. D.

When executor or administrator may charge interest on payments made out of his own money.

If an executor or administrator out of his own money pays debts of the deceased which carry interest, or satisfies creditors who are pressing and threaten proceedings, he is entitled not only to priority for sums so paid but also to be allowed interest thereon (*r*). But where interest is allowed it should be calculated from the time of a balance being struck on the general report or certificate, for until that time, it cannot be ascertained that he has not money in his hands (*s*).

Interest will not be allowed on a sum paid by the executors or administrators out of their own moneys for costs which they have been compelled to pay (*t*).

Duty to keep, deliver and vouch accounts.

It is the threefold duty of a trustee to keep accounts, to deliver accounts, and to vouch accounts after delivery. The duty of a trustee to keep accounts is an essential duty ; he must keep such accounts so as to be able to deliver a proper account within a reasonable time showing what he has received and paid. As to the duty of delivering accounts, different considerations apply. In the case of very long accounts the trustee may incur considerable expense, and he could not be called upon to deliver accounts until his expenses have been guaranteed. The duty of vouching accounts does not arise till after the accounts have been delivered (*u*).

Cost of taking accounts by the Court.

Since 1883 there is no longer any general right to have an account taken, and it is by no means a matter of course that the costs of taking the account are paid out of the estate. In cases where proceedings for administration are rendered necessary by the gross and indefensible neglect of trustees to deliver accounts, the defaulting trustees may be ordered to pay all the costs, including the costs of taking and vouching the accounts ; and such an order may be made in proceedings commenced by originating summons (*x*).

518 ; *Re* Cleveland's (Duke of) Settled Estates, [1902] 2 Ch. 350.

(*r*) Small *v.* Wing, (1732) 5 Bro. P. C. 66, 72.

(*s*) Gordon *v.* Trail, (1820) 8 Price, 416.

(*t*) Gordon *v.* Trail, *ubi sup.* ; Lewis *v.* Lewis, (1850) 13 Beav. 82.

(*u*) *Re* Watson, (1904) 49 Sol. J. 54, per Kekewich, J. ; and see *Re* Bosworth, (1889) 58 L. J. Ch. 432.

(*x*) *Re* Skinner, [1904] 1 Ch. 289.

Order 55, r. 10A, provides that upon an application for administration or execution of trusts by a creditor or beneficiary under a Will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Court or a judge may, in addition to the powers already existing, order that the application shall stand over for a certain time, and that the executors, administrators, or trustees in the meantime shall render to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings. The plaintiff, however, has an absolute right to examine the accounts, to contest any items of them, and to surcharge any item which may be omitted in the accounts, but under this rule the Court may treat the accounts which have been brought in as being a statement of account, and give the parties liberty to contest it at their own risk as to costs (*y*).

Audit by Public Trustee.

The Public Trustee Act, 1906, s. 13, makes provision for the investigation and audit of trust accounts by the Public Trustee, or some person appointed by him, at the instance of any trustee or beneficiary, without any application to the Court (*z*).

Money which but for his wilful default he might have received.

An executor or administrator may be charged, not only for his actual receipts, but also for money which but for his wilful default he might have received.

After common administration judgment plaintiff cannot maintain subsequent action charging wilful default without leave of the Court.

Where a plaintiff has obtained a common administration judgment against an executor or administrator, he cannot maintain a subsequent action against the same defendant in which he charges him with wilful default in the administration of the same estate, unless he has obtained the leave of the Court to bring such action (*a*).

Where allegations of wilful default are made the Court ought as a general rule to dispose of them at the hearing,

(*y*) *Re* Fish, [1893] 2 Ch. 413, 427.

(*z*) See Appendix.

(*a*) Laming *v.* Gee, (1878) 10 C. D. 715.

although it has a discretion to allow the inquiry to stand over in such manner as may appear reasonable (*b*).

As to when further accounts and inquiries may be directed on the footing of wilful default.

If wilful default is charged in the pleadings, but the judgment at the trial gives no relief on that footing (the claim to such relief not being, however, dismissed), the Court can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries on that footing (*c*). And it would seem that, although the pleadings do not contain a charge of that kind, yet if some facts in taking the accounts emerge for the first time which show that the executor or administrator has committed wilful default, the Court will, without putting the parties to the expense of a supplemental action, give leave for an inquiry upon that footing to be made, which is in the nature of supplemental relief—that is, granted upon the ground which induced the Court generally to give leave to file a supplemental bill—because of new facts having been discovered since the decree was made (*d*).

On taking common account, money wrongly invested may be disallowed.

Where the account directed by the order is what is known as a "common account," the trustee is bound not only to bring in an account of his receipts, but to discharge himself as regards those receipts, and show what he has done with the money received. Consequently if an investment is made in improper securities, not authorised by the terms of the Will or the general law, the trustee is not allowed to discharge himself on account of that investment, and he is charged in respect of it on the common account. To this extent a breach of trust can be dealt with on originating summons, notwithstanding the rule that in any contested case an originating summons is not the proper mode of deciding the question (*e*).

The liability of executors or administrators is joint and several.

The liability of trustees, including in that expression executors and administrators, for breaches of trust is joint and several, and until the persons enforcing such liability

(*b*) Smith *v.* Armitage, (1883) 24 C. D. 727.

(*c*) *Re* Symons, (1882) 21 C. D. 757; but see *Re* Wrightson, [1908] 1 Ch. 789.

(*d*) Per Kay, J., in Edmonds *v.* Robinson, (1885) 29 C. D. 170, 175.

(*e*) *Re* Stuart, (1896) 74 L. T. 546; *Re* Newland, (1904) W. N. 181; Williams (10th ed.) 1511.

have been paid in full they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment in respect of his several liability, and whether in or towards satisfaction of that liability. Therefore where the executors of the deceased trustee and two surviving trustees were jointly and severally liable to make good a breach of trust, and the Court sanctioned a compromise with one of the surviving trustees, from whom a sum was in consequence received in full settlement and discharge of his liability to the plaintiffs in the action, it was held that the plaintiffs were entitled to prove against the insolvent estate of the deceased trustee for the full amount of the sum certified to be due from the trustees, and to receive dividends on such proof until by means thereof and payment by the other trustees that amount had been wholly satisfied (*f*).

Compromise of claim against one will not discharge the other.

In administration proceedings when a sum of money or a balance is found due from an accounting party he may be ordered to pay it into Court (*g*).

Order for payment into Court.

Order 55, r. 3 (d), enables the Court on originating summons to order payment into Court of any money in the hands of executors or administrators or trustees. But this rule applies only to money actually in the hands of the executor or administrator or trustee. It is not sufficient that it may have been in his hands, and that he is responsible for it. It follows that it does not apply to money which may or may not be found due from him on the result of an investigation (*h*).

The present practice is not to order payment of money into Court by a defendant upon interlocutory motion on the ground of admissions made by him, unless it is made out to the satisfaction of the Court that the defendant has the sum claimed in his hands, and that he has no real defence to the plaintiff's demand (*i*).

(*f*) Edwards *v.* Hood-Barrs, [1905] 1 Ch. 20.
(*g*) See Dan. Ch. P. (7th ed.) p. 863.
(*h*) Nutter *v.* Holland, [1894] 3 Ch. 408.
(*i*) Neville *v.* Matthewman, [1894] 3 Ch. 345.

If the defendant had sold stock, and before any question arose disposed of the purchase money, in answer to an interlocutory motion for payment into Court of the purchase money, he must depose to the fact that the purchase money is no longer under his control (*k*). But it would seem that he cannot escape liability to pay into Court by merely stating that he has paid the money away to someone to whom he had no right to pay it and who had no title to receive it (*l*).

Attachment in default.

Where a trustee or person acting in a fiduciary capacity is ordered to pay into Court, by a Court of Equity, any sum in his possession or under his control, and he makes default, leave to issue a writ of attachment against him for his contempt may be granted (*m*); but it must be proved on the application that the money ordered to be paid into Court is or has been in the actual possession or control of the person sought to be committed; mere constructive receipt by an agent or solicitor on his behalf, who may never have accounted, is not enough (*n*).

Where the plaintiff in an action against an executor or administrator or trustee for recovery of a sum of money due from him on a misapplication of trust funds takes an ordinary judgment against him for recovery of the sum in question, the judgment cannot be supplemented by an order for payment within a limited time, so as to found a right to issue a writ of attachment against the defendant in default of payment within the stipulated time (*o*). Moreover where the plaintiff in an administration action is certified to be the sole creditor and an order is made against the executor for personal payment of the certified debt, the fiduciary relation is at an end, and the punitive jurisdiction under the Debtors Act, 1869, cannot be put in force (*p*).

(*k*) *Re* Benson, [1899] 1 Ch. 39.

(*l*) Crompton & Evans' Union Bank *v.* Burton, [1895] 2 Ch. 711.

(*m*) Ord. 42, r. 4; and see Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4; Debtors Act, 1878 (41 & 42 Vict. c. 54). As to a debtor executor, see *Re* Bourne, [1906] 1 Ch. 697.

(*n*) *Re* Fewster, [1901] 1 Ch. 447; *Re* Wilkins, (1901) W. N. 202.

(*o*) *Re* Oddy, [1906] 1 Ch. 93.

(*p*) *Re* Thomas, [1912] 2 Ch. 348.

In the case of a married woman being executrix or administratrix or trustee, an order may be made upon her for payment of money into Court, and if the order is for the better securing the fund, and not to make good a devastavit committed by her, the order may be enforced by writ of attachment ; but if the object of the order is to compel the married woman to make good a loss occasioned by her devastavit, the order should be made in the form prescribed in *Scott* v. *Morley* (*q*), under which she would not be liable to attachment for non-compliance with it (*r*).

There is no absolute rule that beneficiaries entitled to a trust fund in the hands of trustees have the right to have it brought into Court. If proper trustees are kept up and the fund is not in jeopardy the leaning of the Court is not to interfere (*s*).

(*q*) (1887) 20 Q. B. D. 120.
(*r*) *Re* Turnbull, [1900] 1 Ch. 180.
(*s*) *Re* Braithwaite, (1882) 21 C. D. 121.

CHAPTER XLV.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR FOR HIS TORTIOUS ACTS.

Personal representative liable for all breaches of ordinary trusts arising from his office.

WHERE an executor or administrator accepts that office he accepts the duties of the office, and he becomes a trustee in the sense that he is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office (*a*).

Instances.

An executor or administrator is therefore guilty of a devastavit not merely should he misappropriate the assets to his own purposes, but also if he misapplies the assets, as by paying excessive sums for funeral expenses (*b*), or by paying debts of inferior degree with notice of debts of superior degree (*c*), or by making payments to beneficiaries before discharging the debts (*d*), or by needlessly and without authority carrying on the business of the deceased (*e*), or by applying the assets in payment of a claim which he was not bound to satisfy (*f*).

So also such acts of negligence or careless administration as defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a devastavit (*g*), as if by his delay in taking proceedings a debtor of the deceased is enabled to plead the Statute of Limitations (*h*), or the debt is lost owing to bankruptcy of the debtor (*i*), or by his inability to pay (*k*),

(*a*) Williams (10th ed.) 1434; and see *Re* Marsden, (1884) 26 C. D. 783, 789, per Kay, J.

(*b*) *Ante*, p. 346.

(*c*) *Ante*, p. 361.

(*d*) *Re* Marsden, *ubi sup.*

(*e*) *Ante*, p. 430.

(*f*) Williams (10th ed.) 1438; and see Midgley *v.* Midgley, [1893] 3 Ch. 282, and *ante*, pp. 252, 372.

(*g*) Williams (10th ed.) 1441.

(*h*) Hayward *v.* Kinsey, (1702) 12 Mod. 573.

(*i*) Powell *v.* Evans, (1801) 5 Ves. 839; Att.-Gen *v.* Higham, (1843) 2 Y. & Coll. C. C. 634.

(*k*) Stiles *v.* Guy, (1848) 16 Sim. 230; *Re* Brogden, (1886) 38 C. D. 546.

when but for such neglect it might have been recovered (*l*), or if he neglects to realise the assets at a proper time whereby loss is occasioned (*m*), or by allowing beneficiaries to enjoy in specie wasting property instead of realising it (*n*), or if he allows debts bearing interest to run on when he had assets in hand sufficient to discharge them (*o*), or if having got possession of goods he subsequently by want of reasonable care allows them to be lost or destroyed (*p*), or if he neglects to invest considerable balances in his hands not wanted for the exigency of the deceased's affairs (*q*), or if he unnecessarily allows money to be in the hands of agents (*r*). But an executor or administrator is not bound to insure or to continue the insurance of his testator's or intestate's property against loss by fire (*s*).

Nature of liability.

In a Court of Equity the liability in a case of breach of trust is not in damages, but for restitution, in the nature of debt (*t*).

When devastavit of one executor shall not charge others.

Speaking generally, a devastavit by one of two executors or administrators will not charge his companion, provided he has not intentionally or otherwise contributed to it (*u*). Hence, an executor will not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor; also, the circumstance that one of two executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, will not affect the latter so as to make him guilty of a devastavit by paying an inferior debt; though perhaps, if notice to one executor be proved, and nothing

(*l*) East *v.* East, (1846) 5 Hare, 348, 349; Stiles *v.* Guy, (1848) 16 Sim. 230.

(*m*) Taylor *v.* Tabrum, (1833) 6 Sim. 281.

(*n*) Wightwick *v.* Lord, (1857) 6 H. L. C. 217.

(*o*) Bate *v.* Robins, (1862) 32 Beav. 73.

(*p*) Job *v.* Job, (1877) 6 C. D. 562; and see Jobson *v.* Palmer, [1893] 1 Ch. 71.

(*q*) Jebbs *v.* Carpenter, (1816) 1 Madd. 290.

(*r*) Johnson *v.* Newton, (1853) 11 Hare, 160, 168; Speight *v.* Gaunt, (1883) 22 C. D. 727; 9 App. Cas. 1.

(*s*) Bailey *v.* Gould, (1840) 4 Y. & C. 221; 54 R. R. 479; and see Fry *v.* Fry, (1859) 27 Beav. 144; *Re* McEacharn, (1911) 103 L. T. 900.

(*t*) *Ex parte* Adamson, (1878) 8 C. D. 807, 819; *Re* Macfadyen, [1908] 2 K. B. 817; and see *ante*, p. 426.

(*u*) Stiles *v.* Guy, (1848) 1 Mac. & G. 422, 435.

more appears, it may be presumed that he communicated it to his co-executor (*x*).

When devastavit by one executor will charge others.

But if one executor unnecessarily does an act which enables his co-executor to obtain sole possession of money belonging to the testator's estate, which, but for that act, he could not have obtained possession of, and this money is afterwards misapplied, the executor who thus enables his co-executor to obtain possession of the money is liable to make good the loss (*y*). Such an act is not unnecessary if it is done in the regular course of business (*z*).

If an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, he is not responsible (*a*). It is, however, the duty of all executors to watch over, and, if necessary, to correct, the conduct of each other, and an executor who stands by and sees a breach of trust committed by his co-executor becomes responsible for that breach of trust (*b*).

Standard of duty as stated in *Speight* v. *Gaunt* and *Re Whiteley*.

The standard of a trustee's duty as stated by Lord Blackburn in *Speight* v. *Gaunt* (*c*), and explained by Lindley, L.J., in *Re Whiteley* (*d*), is not to take such care only as a prudent man would take if he had only himself to consider, but rather to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

Duty as to choice of investment.

Trustees are not justified in investing trust funds in any property where active and exceptional vigilance and diligence is requisite on their part to anticipate and prevent a loss to their *cestuis que trust* (*e*).

(*x*) See Williams (10th ed.) 1467.

(*y*) Candler *v.* Tillett, (1855) 22 Beav. 257, 263; *Re* Gasquoine, [1894] 1 Ch. 470.

(*z*) Clough *v.* Bond, (1837) 3 My. & Cr. 490, 497; *Re* Gasquoine, *ubi sup.*

(*a*) Langford *v.* Gascoyne, (1805) 11 Ves. 333, 335; Terrell *v.* Matthews, (1841) 1 M. & G. 433, n. (*a*).

(*b*) Stiles *v.* Guy, (1848) 1 Mac. & G. 422, 433; Williams *v.* Nixon, (1840) 2 Beav. 472, 475; Horton *v.* Brocklehurst, (1858) 29 Beav. 504.

(*c*) (1883) 9 App. Cas. 1, 19; see also observations of Parker, J., in *Re* Mackay, [1911] 1 Ch. 300.

(*d*) (1886) 33 C. D. 347, 355.

(*e*) *Re* Whiteley, *ubi sup.*, per Lopes, L.J., at p. 359. As to what are trust investments authorised by statute see the Trustee Act, 1893 (56 & 57 Vict. c. 53), Part I., ss. 1—9

Not liable for mere errors of judgment.

But trustees acting honestly with ordinary prudence and within the limits of their trust are not liable for mere errors of judgment. For instance, an honest trustee is not liable to make good loss sustained by retaining an authorised security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties (*f*). So also where a testator left money invested in speculative securities, and after the twelve months from the death the executors in the honest exercise of their discretion thought it more prudent to wait for a rise, it was held that they ought not to be made personally responsible for the loss arising from not having sold within the twelve months (*g*).

Extent of liability.

Trustees investing trust money in an unauthorised security are responsible for any future loss traceable to that first error (*h*).

Liability not increased by receipt of remuneration.

The liability of a trustee is not increased by the fact of his being remunerated for his services (*i*).

Not liable for felonious acts of servants.

A trustee, although remunerated for his services, is not liable for loss occasioned to the trust estate by the felonious acts of his servant, provided such servant is properly entrusted with the custody of the trust property, and is selected and employed without negligence (*k*).

Entitled to indemnity against liability for acts of agents.

So a trustee who employs a proper agent to do an act within the due discharge of his duty is entitled to be indemnified out of the trust estate against any legal liability which the trustee may incur to a third party by reason of the mistake or negligent act of such agent (*l*).

as extended by the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), s. 2; and see *Re* Maryon Wilson's Estate, [1912] 1 Ch. 58 (that a part of a colony or dependency is not itself a colony or dependency). A direction to keep trust funds and invest the same in one particular way does not expressly forbid investment in any of the investments authorised by the Acts: *Re* Burke, [1908] 2 Ch. 248. That a power to vary investments may be implied from a power to invest, see *Re* Pope's Contract, [1911] 2 Ch. 442.

(*f*) *Re* Chapman, [1896] 2 Ch. 763, 776, per Lindley, L.J.

(*g*) Marsden *v.* Kent, (1877) 5 C. D. 598.

(*h*) Fyler *v.* Fyler, (1841) 3 Beav. 550; Lander *v.* Weston, (1855) 3 Drew, 389.

(*i*) Jobson *v.* Palmer, [1893] 1 Ch. 71; Shepherd *v.* Harris, [1905] 2 Ch. 310, 318.

(*k*) Jobson *v.* Palmer, *ubi sup.*

(*l*) Benett *v.* Wyndham, (1862) 4 De G. F. & J. 259; and see *Re* Solomon,

Must use prudence in acting on advice.

Although trustees may and must seek advice on matters they do not themselves understand, yet in acting on advice given to them they must act with the prudence already referred to (*m*).

Employment of agents.

Although a trustee cannot delegate his trust, yet he is entitled to employ persons to do that which an ordinary man of business would employ an agent to do. The law is stated as follows by Lord Selborne in *Speight* v. *Gaunt* (*n*).

"In the early case of *Ex parte Belchier* (*o*), before Lord Hardwicke, it was determined that trustees are not bound personally to transact such business connected with or arising out of the proper duties of their trust, as according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through mercantile agents, and that when, according to the usual and regular course of business, moneys receivable or payable ought to pass through the hands of such mercantile agents, that course may properly be followed by trustees, though the moneys are trust moneys; and that if, under such circumstances, and without any other misconduct or default on the part of the trustees, a loss takes place through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed, and, in conformity with it, the stat. 22 & 23 Vict. c. 35, s. 31, enacts that every instrument creating a trust shall be deemed to contain a clause exonerating the trustees from liability for any banker, broker, or other person with whom any trust moneys or securities may be deposited.

"Neither the statute, however, nor the doctrine of *Ex parte Belchier* (*p*) authorises a trustee to delegate, at his own

[1912] 1 Ch. 261, as to the duty of surveyors and valuers in advising trustees on lending trust money.

(*m*) *Ante*, p. 657; *Re* Whiteley, (1886) 33 C. D. 347, 350, 356; S. C. Learoyd *v.* Whiteley, (1888) 12 App. Cas. 727, 731; and see *Re* Somerset [1894] 1 Ch. 231, 273.

(*n*) (1883) 9 App. Cas. 1, 4.

(*o*) (1754) Amb. 218.

(*p*) *Ubi sup.*

mere will and pleasure, the execution of his trust, and the care and custody of the trust moneys, to strangers, in any case in which (to use Lord Hardwicke's words) there is no 'moral necessity from the usage of mankind' for the employment of such an agency. The cases of *Rowland* v. *Witherden* (*q*), *Floyer* v. *Bostock* (*r*), and many others, show that trustees bound to invest trust moneys in authorised securities, are *primâ facie* answerable for the proper care and custody of such trust moneys, until they are actually so invested; and will not be exonerated from liability if, in the meantime, they leave them in other hands, though the hands of professional advisers or agents, to whose assistance, for many purposes connected with the trust, they may properly have recourse."

The rule laid down in *Speight* v. *Gaunt* applies to a case where a co-trustee is employed and paid as broker under a clause in the Will creating the trust (*s*).

An obvious limitation of the rule stated in *Speight* v. *Gaunt* is that the agent must not be employed out of the ordinary scope of his business. If a trustee employs an agent to do that which is not the ordinary business of such an agent, and he performs that unusual duty improperly, and loss is thereby occasioned, the trustee would not be exonerated. For instance, it is not part of the ordinary business of a solicitor to choose a valuer for trustees intending to invest trust money on mortgage. The trustees must exercise their own judgment in such a case (*t*). So in *Speight* v. *Gaunt*, if the trustee had exercised no discretion as to the choice of a broker, but had left that to his solicitors who had employed a man known to them to be untrustworthy, the trustee would not have been exonerated (*u*).

Stock Exchange purchases.

So in purchase transactions on the Stock Exchange trustees may allow trust money to pass through the hands of the broker, but not in the case of purchases outside the

(*q*) (1852) 3 Mac. & G. 568, 574.
(*r*) (1865) 35 Beav. 603, 606.
(*s*) Shepherd *v.* Harris, [1905] 2 Ch. 310.
(*t*) Fry *v.* Tapson, (1884) 28 C. D. 268.
(*u*) Per Kay, J., in Fry *v.* Tapson, *ubi sup.*

Stock Exchange as in such case there is no "moral necessity from the usage of mankind" (*x*).

In the case of running accounts between brokers and their clients, upon the clients' death it is the duty of the broker to close the account and to minimise any loss to the utmost extent (*y*).

Except so far as is authorised by the statutes next mentioned, trustees who in selling trust property, or changing an investment, allow the trust fund to pass into the hands of their solicitors, and it is lost in consequence, will be liable (*z*).

Effect of allowing money on the sale of trust property to pass into the hands of solicitors.

Sect. 56 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that :—

(1) "Where a solicitor produces a deed, having in the body thereof, or indorsed thereon, a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt."

Trustee Act, 1893, s. 17.

And s. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), which by s. 50 applies to an executor or administrator, provides as follows :—

Solicitor appointed agent on production of deed containing receipt to receive the consideration.

(1) "A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of and to produce a deed containing any such receipt as is referred to in s. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by

(*x*) *Re* Mackay, [1911] 1 Ch. 300, at p. 306, per Parker, J.
(*y*) *Re* Finlay, [1913] 1 Ch. 247; 1 Ch. 565 (C. A.).
(*z*) *Ibid.*

the solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee."

Banker or solicitor appointed agent to receive money payable under a policy of assurance.

(2) "A trustee may appoint a banker or solicitor to be his agent to receive or give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or the solicitor to have the custody of, and to produce, the policy of assurance, with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment."

Banker or solicitor not to retain control longer than reasonably necessary.

(3) "Nothing in this section shall exempt a trustee from any liability which he would have incurred if this Act had not passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee."

(5) "Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust."

In order to bring into operation s. 17 (3) the circumstances must be such that the trustee either knew or ought to have known of the receipt of the money (*a*).

Effect of Trustee Act, 1893, s. 24, making him accountable for his own wilful default only.

The Trustee Act, 1893, s. 24 (re-enacting 22 & 23 Vict. c. 35, s. 31), provides that "A trustee [which by s. 50 includes the personal representative of a deceased person] shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or

(*a*) *Re* Sheppard, [1911] 1 Ch. 50.

deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default, and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

This statute does not substantially alter the law as it was administered by Courts of Equity, but gives it the authority and force of statute law and throws the *onus probandi* on those who seek to charge an executor or administrator, or trustee, with a loss arising from the default of an agent, when the propriety of employing an agent has been established (*b*).

Effect of Trustee Act, 1893, s. 45, as to impounding by way of indemnity the interest of a beneficiary.

The Trustee Act, 1893, s. 45 (1) (substituted for s. 6 of the Trustee Act, 1888), provides that "Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

What amounts to instigating or requesting or consenting.

The words "in writing" in this section apply only to "consent" and not to "instigation" or "request" (*c*).

In order to make a beneficiary liable under this section in respect of an improper investment, it must be shown not only that he instigated, requested or consented in writing to the investment, but that he knew the facts which would make it a breach of trust. If a *cestui que trust* merely instigates, requests, or consents in writing to an investment which is authorised by the terms of the power, he has a right to expect that the trustees will act with proper care in making the investment, and if they do not they cannot throw the consequences on him, unless they can show that he instigated, requested, or consented in writing to their non-performance of their duty in this respect. In order to bring the case within

(*b*) *Re* Brier, (1884) 26 C. D. 238, 243, per Ld. Selborne.

(*c*) Griffith *v.* Hughes, [1892] 3 Ch, 105; *Re* Somerset, [1894] 1 Ch. 231, 265.

the section the beneficiary must have instigated, requested, or consented in writing to the trustee departing from and going outside the terms of the trust (*d*).

The discretionary power conferred upon the Court by this section ought to be exercised in a case where both the trustee and the instigating beneficiary were aware of the facts which constitute the breach of trust (*e*).

Circumstances under which Court will remove restraint on anticipation in such cases.

It is the duty of a trustee to protect a married woman restrained from anticipation against herself when she asks him to commit a breach of trust, and if he knowingly commits a breach of trust at her request the Court will be slow to remove the restraint in order that her life interest may be impounded to recoup him (*f*).

Merely consenting without instigating or requesting or obtaining any personal benefit.

If the beneficiary claiming under a trust does not instigate or request a breach of trust—is not the active moving party towards it, but merely consents to it—and he obtains no personal benefit from it, then his interest in the trust estate would not be impoundable in order to indemnify the trustee liable to make good loss occasioned by the breach (*g*).

Apart from Act beneficiary may be debarred from claiming relief.

The sections of the above Acts clearly extended the power of the Court so far as concerns the case of a married woman restrained from anticipation, and also by giving power to the Court to impound any part of the interest in the trust property of any beneficiary who consented to a breach of trust, provided that consent was in writing; but there is nothing in those sections which operates to deprive the trustee of his right independently of the Acts, namely, the right of saying as against a beneficiary of full contracting age and capacity, who knowingly consents to a breach of trust, that he is not entitled to relief against the trustee for any loss occasioned to that beneficiary's interest in the trust estate by reason of the breach of trust, even though he has derived no benefit thereby, and for this purpose the consent and the breach of trust, if proved, need not be in writing (*h*).

(*d*) *Re* Somerset, [1894] 1 Ch. 231.
(*e*) Griffith *v.* Hughes, [1892] 3 Ch. 105.
(*f*) Bolton *v.* Curre, [1895] 1 Ch. 544.
(*g*) Fletcher *v.* Collis, [1905] 2 Ch. 24, 32.
(*h*) *Ibid.*

Trustee being *cestui que trust*, cannot claim contribution.

So a *cestui que trust*, being also a trustee, who concurs in a breach of trust, is not entitled to relief against his co-trustee in respect of it ; for although where co-trustees, plaintiff and defendant, are *in pari delicto*, the plaintiff is entitled to contribution from the defendant to the extent of one half the loss, yet where the plaintiff is also *cestui que trust*, the defendant is entitled to be indemnified out of the share of the plaintiff against the consequences of the breach of trust committed at his request and for his benefit (*i*). Moreover this doctrine applies to a person who becomes a *cestui que trust* after his concurrence (*k*).

Effect of Trustee Act, 1888, s. 8, entitling trustees to benefit of Statute of Limitations.

An executor or administrator is, under s. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59) (*l*), entitled to the benefit of any Statute of Limitations, or, where no existing Statute of Limitations applies, to plead lapse of time as a bar to any action or other proceeding in like manner as if the claim had been against him in an action of debt, and the statute shall run against a married woman entitled in possession for her separate use whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession. The benefit of this Act, however, does not apply where the claim against the executor or administrator is founded upon any fraud or fraudulent breach of trust to which he was a party or privy, or is to recover trust property, or the proceeds thereof still retained by him or previously received by him and converted to his use.

The Act may be pleaded as a bar notwithstanding any fraud or fraudulent breach of trust by an agent employed by the executor or administrator, provided the latter was not "party or privy" to the fraud (*m*).

Trust moneys not being in the hands or under the control of trustees when the action was brought, are not "still retained" by them within the meaning of the Act (*n*).

(*i*) Chillingworth *v.* Chambers, [1896] 1 Ch. 685.

(*k*) Evans *v.* Benyon, (1887) 37 C. D. 329.

(*l*) See *ante*, p. 456.

(*m*) Thorne *v.* Heard & Marsh, [1895] A. C. 495.

(*n*) *Ibid.*

The effect of s. 8 of the Trustee Act, 1888, is that any action or proceeding to recover money or other property from trustees (being one to which no Statute of Limitations existing at the passing of the Act applies) is to be brought within six years from the time when the right of recovery accrued, *e.g.*, in the case of an innocent breach of trust by investing trust money upon mortgage of property of insufficient value—from the time when the investment was made. But the statute, though a defence as regards the claim of the tenant for life, is not a defence against persons entitled in remainder who are not yet in possession (*o*).

Effect of the Judicial Trustees Act, 1896, s. 3, enabling Court to relieve where trustee has acted honestly and reasonably.

The Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3 (1), provides that: "If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same."

In order to grant relief under this section the Court has to find as a fact that the trustee has acted honestly and reasonably and ought fairly to be excused. No general rules or principles can be laid down as those to be acted upon in carrying out the section, and each case must be dealt with according to its own circumstances. The section is meant to be acted upon freely and fairly in the exercise of judicial discretion, but the Court ought to be satisfied by sufficient evidence before exercising the large powers conferred upon it, that the trustees acted reasonably as well as honestly (*p*). The burden lies on the trustee to show that he has acted reasonably (*q*).

(*o*) *Re* Somerset, [1894] 1 Ch. 231; *Re* Dive, [1909] 1 Ch. 328, 336; *Re* Fountaine, [1909] 2 Ch. 382.

(*p*) *Re* Turner, [1897] 1 Ch. 536; *Re* Roberts, [1897] 76 L. T. 479, 483; *Re* Stuart, [1897] 2 Ch. 583, 590.

(*q*) *Re* Stuart, *ubi sup.*

The following are some instances where the Court has given relief :—

Instances where Court has given relief.

1. Where the defendant, the executor of a solicitor, believing, and on grounds that justified that belief although erroneous, that the deceased solicitor had no right of action against the client personally for the costs incurred in certain administration proceedings, took no steps to recover such costs (*r*).

2. Where an executor who paid an immediate legacy to the widow of the testator and allowed her to receive the income of the estate, which at the time he had reason to believe was solvent, notwithstanding delay in issuing advertisements, was relieved in respect of payments made prior to the issue of writ by a creditor, although subsequent payments were held to have been made at his own risk (*s*).

3. Where executors, having reason to suppose that a debtor of the testator on a promissory note, bearing interest, was in good credit at the testator's death and able to pay, and having come to the conclusion erroneously, on the construction of an obscure Will, that it was not the intention of the testator that the promissory note should be called in, omitted to do so for nearly two years, when on the death of the debtor his estate was found insolvent and the money was to a considerable extent lost (*t*).

4. Where executors made payments to their solicitors from time to time for payment of debts, disbursements, and other administration purposes, in reliance on their statements that the sums were in each case required for those purposes, and, the solicitors becoming bankrupt, the balance unapplied by them and remaining in their hands was lost to the estate (*u*). Also where one trustee signed cheques in favour of his co-trustee, a solicitor, for payment of death duties (*x*).

5. Where trustees sold leaseholds under the advice of

(*r*) *Re* Roberts, [1897] 76 L. T. 479.
(*s*) *Re* Kay, [1897] 2 Ch. 518.
(*t*) *Re* Grindey, [1898] 2 Ch. 593.
(*u*) *Re* Lord De Clifford's Estate, [1900] 2 Ch. 707.
(*x*) *Re* Mackay, [1911] 1 Ch. 300.

their solicitors that they had power to sell when they had no such power, but in other respects the sale was a judicious one having regard to the interests of reversioners as well as tenant for life, whereby the plaintiff, the tenant for life, incurred loss of income (*y*).

6. Also where trustees, acting on the advice of solicitors, invested on mortgage without an actual valuation, but at a value calculated at a rate at which adjacent property had sold for by auction in a previous year, they were relieved except to the extent of the excess over two-thirds of the actual value (*z*).

Instances where Court has refused relief.

But a trustee does not act reasonably so as to entitle him to be excused when he leaves everything to his co-trustee, even though the latter is a solicitor and has been nominated by the testator (*a*).

And where an executrix, without consulting a solicitor, but on the advice of a commission agent who had been a friend and adviser of her deceased husband, postponed for fourteen years the sale of some shares instead of selling them within the year after the testator's death, her conduct was held not reasonable and relief was refused (*b*).

Right of beneficiary to follow trust funds so long as they can be traced.

In addition to the personal liability of an executor or administrator for a devastavit, persons beneficially interested are entitled to follow trust funds. So long as the trust property can be traced and followed into other property, into which it has been converted, it remains subject to the trust

(*y*) Perrins *v.* Bellamy, [1899] 1 Ch. 797.

(*z*) Waite *v.* Parkinson, (1901) 85 L. T. 456; but see *Re* Stuart, [1897] 2 Ch. 583, where it was held that *primâ facie* the requirements of s. 4 of the Trustee Act, 1888, and s. 8 of the Trustee Act, 1893, constitute a standard by which reasonable conduct is to be judged; see also Shaw *v.* Cates, [1909] 1 Ch. 389. Sect. 8 is a relieving section, and does not impose a statutory obligation upon trustees to take a valuation: Palmer *v.* Emerson, [1911] 1 Ch. 758; it is, however, no protection if the breach of trust consists not only in advancing more than the proper proportion of the value of the property, but also in an unauthorised investment, for instance, on contributory mortgage, and the trustee will not be entitled to relief under s. 3 of the Trustee Act, 1896: *Re* Dive, [1909] 1 Ch. 328.

(*a*) *Re* Turner, [1897] 1 Ch. 536; and see *Re* Second East Dulwich Building Society, (1899) 68 L. J. Ch. 196.

(*b*) *Re* Baker, (1898) 77 L. T. 712.

and the trustee cannot assert a title of his own. And if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own (*c*).

Option of beneficiary in case of unauthorised purchases.

If a trustee makes an unauthorised purchase with trust funds, the beneficial owner is entitled at his election to take the property, or to have a charge on the property for the amount of the trust money. But when a trustee has mixed the money with his own, and has bought the property with the mixed fund, the beneficial owner can no longer elect to take the property, but he is still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase ; and that charge is quite independent of the fact of the amount laid out by the trustee (*d*).

Effect of trustee mixing trust money with his own.

So if a person has received money in a fiduciary character and has paid it into his own account at his bankers, mixing it with his own money, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and if subsequently he, from time to time, draws out money, the rule in *Clayton's Case* (*e*), attributing the first drawings out to the first payments in, does not apply, but he must be taken to have drawn out his own money in preference to the trust money (*f*). Moreover, if out of the moneys drawn from the account he purchased an investment which remains in his own name, and subsequently dissipated the balance, his representatives cannot successfully maintain that the investment which remains was purchased out of the trustee's own money, and that which has been spent, and can no longer be traced and recovered, was the money belonging to the trust (*g*).

(*c*) Pennell *v.* Deffell, (1855) 4 D. M. & G. 372.

(*d*) *Re* Hallett's Estate, (1879) 13 C. D. 696, 709.

(*e*) (1816) 1 Mer. 572.

(*f*) *Re* Hallett's Estate, *ubi sup.*

(*g*) *Re* Oatway, [1903] 2 Ch. 356. As to the true meaning and effect of Clayton's case, see *Re* Sherry, (1884) 25 C. D. 692, 702 ; Deeley *v.* Lloyd's Bank, Ld., [1912] A. C. 756.

CHAPTER XLVI.

ADMINISTRATION PROCEEDINGS.

PROCEEDINGS relating to the administration of estates of deceased persons may be commenced, according to the circumstances, in (1) the Chancery Division of the High Court, (2) the County Court, or (3) in Bankruptcy.

SECT. 1.—*Proceedings in the Chancery Division.*

The jurisdiction of the Chancery Division is under s. 34 of the Judicature Act, 1873.

The proceedings may be commenced either by writ of summons or by originating summons under Ord. 55 (*a*).

Proceedings by originating summons are, generally speaking, more expeditious and less expensive than by writ of summons. In an action by writ of summons the proceedings take the usual course of an ordinary action with pleadings and notice of trial, unless otherwise ordered under the summons for directions pursuant to Ord. 30 of R. S. C. By originating summons there are no pleadings, but the summons itself, supported generally merely by affidavit evidence, is disposed of by the master or judge in chambers, unless adjourned to be heard in Court. Although the plaintiff is not precluded in any case from commencing the proceedings by writ of summons, yet, whenever the plaintiff has issued a writ, and the proceedings might have been commenced by originating summons, he will have to justify the course pursued on special

(*a*) The Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 3 (4), enables the public trustee, in accordance with the rules, to take the opinion of the High Court on any question arising in the course of any administration without judicial proceedings.

grounds, otherwise he may be ordered to pay any extra costs thereby occasioned.

Proceedings by originating summons.

With regard to proceedings by originating summons, Ord. 55 provides as follows :—

Rule 3. " The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin, or heir-at-law or customary heir of a deceased person, or as *cestui que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters :—

(*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law, or *cestui que trust :*

(*b*) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others :

(*c*) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts :

(*d*) The payment into Court of any money in the hands of the executors or administrators or trustees :

(*e*) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees :

(*f*) The approval of any sale, purchase, compromise, or other transaction :

(*g*) The determination of any question arising in the administration of the estate or trust."

Rule 4. "Any of the persons named in the last preceding Rule may in like manner apply for and obtain an order for—

(*a*) the administration of the personal estate of the deceased :

(*b*) the administration of the real estate of the deceased :

(*c*) the administration of the trust."

Rule 4A. "If for the purpose of the Land Transfer Act, 1897, it is desirable to ascertain the heir-at-law or any devisee or legatee of the person who has died, having real estate vested in him, within the meaning of that Act, the same may be ascertained and all necessary directions with regard to carrying out the provisions of that Act may be given on any originating summons taken out under Rules 3 or 4 of this order."

Rule 5. "The persons to be served with the summons under the last two preceding Rules in the first instance shall be the following (that is to say) :—

A. Where the summons is taken out by an executor or administrator or trustee—

(*a*) for the determination of any question, under sub-sections (*a*), (*e*), (*f*), or (*g*) of Rule 3, the person, or one of the persons, whose rights or interests are sought to be affected :

(*b*) for the determination of any question, under sub-section (*b*) of Rule 3, any member or alleged member of the class :

(*c*) For the determination of any question, under sub-section (*c*) of Rule 3, any person interested in taking such accounts :

(*d*) for the determination of any question, under sub-section (*d*) of Rule 3, any person interested in such money :

(*e*) for relief under sub-section (*a*) of Rule 4, the residuary legatees, or next-of-kin, or some of them :

(*f*) for relief under sub-section (*b*) of Rule 4, the residuary devisees or heirs, or some of them :

(*g*) for relief under sub-section (*c*) of Rule 4, the *cestui que trust ;* or some of them :

(*h*) if there are more than one executor or administrator or trustee, and they do not all concur in taking out the summons, those who do not concur :

B. Where the summons is taken out by any person other than the executors, administrators, or trustees, the said executors, administrators or trustees."

Having regard to the facility given by these rules of obtaining the opinion of the Court in matters of doubt and difficulty arising in the administration of estates, it is advisable in such cases for executors and administrators to avail themselves of the rules, and apply to the Court, rather than to run risk of personal liability in acting on the opinion of solicitor or counsel, which in many cases is no indemnity (*b*). If they distribute a fund under the direction of the Court they are exonerated from further liability (*c*). Trustees are entitled to the fullest possible protection which the Court can give them, and on applying to the Court under advice, though it may appear to be unsound, will not be readily treated as not acting with propriety, and be deprived of costs (*d*).

Rule as to costs on originating summons.

The rule as to costs in proceeding by originating summons is stated by Kekewich, J., in *Re Buckton* (*e*).

Where the applicants are trustees asking the Court to construe the instrument of trust for their guidance, or to have some question determined which has arisen in the administration of the trusts, the cost of all parties, being incurred for the benefit of the estate, are taxed as between solicitor and client and paid out of the estate.

The same rule is observed if the application is made by some of the beneficiaries by reason of some difficulty of construction, or administration, which would have justified an

(*b*) See observations of Stirling, J., in *Re* Partington, (1888) 57 L. T. (N. S.) 654, 660 ; and see Williams (10th ed.) 1548.

(*c*) *Re* Williams' Settled Estates, 10] 2 Ch. 481, 497.

(*d*) *Re* Buckton, [1907] 2 Ch. 406, 414.

(*e*) *Ubi sup. ;* as to costs in Chancery proceedings generally, see *ante*, p. 352.

application by the trustees, but for some reason a different course has been deemed more convenient. And the Attorney-General coming to the Court for the purpose of having the construction of a charitable bequest determined is in the same position as any other plaintiff (*f*).

But where the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really taking advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, the rule that the unsuccessful party should pay the costs ought to be rigidly enforced as between the adverse litigants, though it may be sometimes a question whether he should bear the trustees' costs (*g*).

Jurisdiction on originating summons.

The object of the above rules was to afford an opportunity of obtaining a decision in a summary way of questions affecting the administration of an estate or trust where it would previously have been necessary to have a decree or judgment for the administration of the estate or execution of the trust (*h*), and the Court has jurisdiction to determine upon an originating summons such questions only as the Court could have determined in an administration action before the order came into existence (*i*).

It has no jurisdiction on originating summons to decide questions between the representative of the deceased person and a person claiming adversely to the estate (*k*), or between persons claiming under a Will and a person claiming adversely to the Will (*l*).

For instance, it cannot decide on originating summons a question between the executor or administrator and a person claiming a certain sum, whether the sum in question belongs to the estate or to the person claiming it as his

(*f*) *Re* Cardwell, [1912] 1 Ch. 779.
(*g*) *Re* Halston, [1912] 1 Ch. 435.
(*h*) *Re* William Davies, (1888) 38 C. D. 210, 212.
(*i*) *Re* Carlyon, (1886) 56 L. J. Ch. 219.
(*k*) *Re* Royle, (1889) 43 C. D. 18.
(*l*) *Re* Bridge, (1887) 56 L. J. Ch. 779; *Re* William Davies, (1888) 38 C. D. 210; and see *Re* Amalgamated Society of Railway Servants, [1910] 2 Ch. 547.

own (*m*) ; or a question arising between devisees and other persons not devisees or interested in the estate of the deceased (*n*) ; or between persons claiming as devisees and the heir-at-law of the testator claiming the property as undisposed of (*o*) ; or between an infant and his father, whether the latter is entitled to an estate by the curtesy out of the mother's undisposed of real estate (*p*) ; or between the trustees of the Will of a legal devisee of real estate of a testator and the trustees of a resettlement made by another person claiming as legal devisee in remainder of the estate (*q*).

But where the personal representative in whom the legal estate in fee of property is vested, and is in possession of the property, desires to have a decision to whom, according to the true construction of the Will, he ought to hand over the property, he may properly apply to the Court by originating summons under Ord. 55, r. 3 (*r*).

So also an equitable tenant for life of a settled estate may apply by originating summons in a proper case to be let into possession (*s*).

Claims arising out of breaches of trust.

With regard to claims arising out of breaches of trust it is the rule of the Court that in any contested case an originating summons is not the proper mode of procedure for deciding the question, except with respect to those cases in which an executor or trustee would be found liable simply on the common account for moneys come to his hands as such executor or trustee (*t*). It would not be competent for an applicant on an originating summons to ask for or obtain, otherwise than by consent, an order founded on breach of trust or inquiries pointing to wilful default (*u*).

Nor, it would seem, would an originating summons, except by consent, be the proper procedure by a beneficiary against

(*m*) *Re* Bridge, (1887) 56 L. J. Ch. 779.
(*n*) *Re* William Davies, (1888) 38 C. D. 210.
(*o*) *Re* Carlyon, (1886) 56 L. J. Ch. 219.
(*p*) Hope *v.* Hope, [1892] 2 Ch. 336.
(*q*) *Ibid.*
(*r*) *Re* Hargreaves, (1890) 43 C. D. 401.
(*s*) *Re* Newen, [1894] 2 Ch. 297; *Re* Hunt, (1900) 44 Sol. J. 314.
(*t*) *Re* Stuart, (1896) 74 L. T. 546.
(*u*) See *Re* Weall, (1889) 37 W. R. 779, per Kekewich, J. ; Dowse *v.* Gorton, [1891] A. C. 190, 202, per Ld. Macnaghten.

the executor or trustee for the execution of the trusts of the Will after the residuary estate has been distributed and a release executed (*x*).

After a common order for administration leave will be given to the plaintiff to bring a fresh action against the executor charging wilful default without proof that he did not become aware of the facts relied on in time to utilise them in the former proceeding (*y*).

Power to appoint receiver and manager on originating summons.

The Court has jurisdiction in proceedings commenced by originating summons to appoint a receiver and manager of a business, and a receiver of residuary personalty (*z*).

Third party notice not applicable;

A third party notice under Ord. 16, rr. 48—55, where a defendant claims to be entitled to contribution or indemnity, is not applicable to proceedings by originating summons (*a*).

nor inquiry as to priorities depending on questions of disputed fact.

The procedure by originating summons does not seem applicable to an inquiry as to priorities between mortgagees, if the question turns on disputed facts which the judge may properly decline to decide on affidavit (*b*).

Service out of the jurisdiction.

Under Ord. 11, r. 8A, an order may be obtained for service of an originating summons out of the jurisdiction in any case in which a like order can be obtained under Ord. 11, r. 1 for service of a writ of summons (*c*). Generally a person out of the jurisdiction will consent to instruct a solicitor here to act for him, and thus submit to the jurisdiction, and get over the difficulty as to service.

When objection to jurisdiction should be taken.

Any objection to the jurisdiction ought to be taken in chambers, and if the objection is taken for the first time after the adjournment into Court, and in consequence the summons is dismissed, the defendant will not be allowed the costs of

(*x*) *Re* Garnett, (1885) 31 C. D. 1, 12; *Re* Ellis, (1888) 59 L. T. 924.

(*y*) *Re* Kurtz, (1904) 90 L. T. 12; but cf. *Re* Wrightson, [1908] 1 Ch. 789; and see *ante*, p. 649.

(*z*) *Re* Francke, (1888) 58 L. T. 305.

(*a*) *Re* Wilson, (1890) 45 C. D. 266.

(*b*) *Re* Giles, (1890) 43 C. D. 391.

(*c*) See *Re* Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de l'Aa, [1910] 2 K. B. 727. No power is given to serve out of the jurisdiction to enforce a charge against personal property in this country: Kolchmann *v.* Meurice, [1903] 1 K. B. 534; Hughes *v.* Oxenham, [1913] 1 Ch. 254.

the adjournment (*d*). And if the objection is not taken in the Court of first instance the defendant will not be allowed to take it in the Court of Appeal (*e*).

Time for appeal.

An originating summons taken out under Ord. 55, r. 3, is an action within the definition of s. 100 of the Judicature Act, 1873, and therefore a final order made thereon is appealable at any time within one year from its date (*f*).

Discretion of executor or administrator, to what extent interfered with.

Order 55, r. 12, provides that the issue of a summons under r. 3 shall not interfere with or control any power or discretion vested in any executor or administrator or trustee except so far as such interference or control may necessarily be involved in the particular relief sought.

Not obligatory to make order for administration.

It is not obligatory to make a judgment or order for the administration of the estate of a deceased person if the question between the parties can be properly determined without such judgment or order (*g*).

Upon the application for administration, where no accounts, or insufficient accounts, have been rendered, the application may be ordered to stand over for a certain time for accounts to be rendered, with an intimation that if not rendered the defendants may be made to pay the costs of the proceedings ; and when the application is rendered necessary to prevent proceedings by other creditors or by persons beneficially interested, the usual judgment or order for administration may be made with a direction that no proceedings are to be taken under it without the leave of the judge in person (*h*).

Orders to be made by judge in person.

An order for general administration or for accounts or inquiries concerning the property of a deceased person must be made by the judge in person (*i*).

When order for general administration will be made.

Whether an order for general administration or partial administration should be made must depend on the circumstances of each case. A decree short of general administra-

(*d*) *Re* William Davies, (1888) 38 C. D. 210.

(*e*) *Re* Turcan, (1888) 58 L. J. Ch. 101.

(*f*) *Re* Fawsitt, (1885) 30 C. D. 231; *Re* Vardon's Trusts, (1886) 55 L. J. Ch. 259.

(*g*) Ord. 55, r. 10.

(*h*) Ord. 55, r. 10A.

(*i*) Ord. 55, r. 15A.

tion will not affect the right of creditors to sue or the right to prefer creditors (*k*). Moreover, the difficulties connected with the case may be such as to render general administration advisable for the protection of the personal representative, as where questions arise as to the carrying on or winding up businesses of the testator (*l*); or for protection of infants interested, as where property is tied up for a long period and there is outstanding property of a hazardous nature (*m*).

Where a testator directs his executors to take proceedings to have his estate administered by the Court, it is the duty of the executors to commence proceedings for that purpose; but the direction does not deprive the Court of its discretion to refuse to make an order for administration, although weight ought to be given to such direction in considering whether the order should be made (*n*).

Subsequent proceedings to be assigned to same judge.

After a summons has been taken out under Ord. 55, r. 3 or r. 4, every subsequent summons relating to the same estate must be assigned to the same judge, and if not, the executor or administrator must apply for the transfer of it to him (*o*).

Conduct of proceedings in concurrent actions.

As a general rule where there are concurrent actions for administration and a judgment is obtained in one of them, the conduct of proceedings is given to the plaintiff in the action which was commenced first. But the Court can act as under special circumstances it thinks right, and where an admitted creditor by proceeding diligently has obtained an order, the conduct will not be taken from him and be given to a person whose claim is *bonâ fide* disputed (*p*).

Consolidation and stay of proceedings.

The Court will not allow multiplicity of actions or vexatious proceedings, and will order consolidation of concurrent actions and a stay of proceedings where all the relief required can be obtained in one and the same proceeding (*q*).

Notice to be given of statutory defence.

In proceedings where there are no pleadings any party intending to rely on the Statute of Limitations or the

(*k*) *Re* Barrett, (1889) 43 C. D. 457.
(*l*) *Re* Dickinson, (1884) W. N. 70.
(*m*) *Re* Wilson, (1885) 28 C. D. 199.
(*n*) *Re* Stocken, (1888) 38 C. D. 319.
(*o*) Ord. 55, r. 11.
(*p*) *Re* Ross, [1907] 1 Ch. 482.
(*q*) See Seton (6th ed.) 835.

Statute of Frauds should give notice by letter or affidavit of the ground of defence, so that the party whose claim is met by the statute may be prepared with his reply (*r*).

Effect of Ord. 16.

Order 16 contains several rules for facilitating procedure in administration proceedings.

Executors and administrators to represent the estate without joining beneficiaries.

Rule 8 enables executors and administrators to sue and be sued on behalf of or as representing the estate without joining any of the persons beneficially interested, unless the Court or judge should otherwise order. This rule obviously would not apply where the question is one of account and the executors or administrators are the accounting parties (*s*).

In approving compromise service on absent parties may be dispensed with.

Rule 9A provides that where a compromise is proposed and some of the parties interested are not parties in the proceedings, but there are other persons in the same interest before the Court and assenting, the Court or judge if satisfied that the compromise will be for the benefit of the absent parties, and that to require service on them would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts.

On questions of construction representation order may be made.

Rule 32 (*a*) provides that in cases of construction, if the Court or judge consider that in order to save expense, or for some other reason, it will be convenient to have the questions of construction determined before the heir-at-law, customary heir, next-of-kin, or class whose rights may be affected shall have been ascertained by means of inquiry or otherwise, the Court or judge may appoint some one or more persons to represent such heir-at-law, customary heir, next-of-kin, or class, and the judgment of the Court or judge in the presence of such persons shall be binding upon the heir-at-law, customary heir, next-of-kin or class so represented.

(*r*) *Re* Shearman, deceased, (1886) 2 T. R. 236; and see Ord. 19 and 15 as to what matters must be raised in the pleadings.

(*s*) May v. Newton, (1887) 34 C. D. 349.

(*b*) "In any other case in which an heir-at-law, or customary heir, or any next-of-kin or a class shall be interested in any proceedings, the Court or judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next-of-kin or class, and the judgment or order of the Court or judge in the presence of the persons so appointed shall be binding upon the persons so represented."

Also in any other case of difficulty in ascertaining persons interested and to save expense.

Rule 33 provides that any residuary legatee or next-of-kin entitled to a judgment or order for the administration of the personal estate of a deceased person may have the same without serving the remaining residuary legatees or next-of-kin.

Any residuary legatee or next-of-kin may obtain order for administration without serving others;

Rule 34 provides that any legatee interested in a legacy charged on real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate.

also any legatee in respect of legacy charged on real estate or proceeds of real estate;

Rule 35 provides that any residuary devisee or heir entitled to the like judgment or order, may have the same without serving any co-residuary devisee or co-heir.

also any residuary devisee or heir;

Rule 38 provides that any executor, administrator or trustee entitled thereto may have a judgment or order against any one legatee, next-of-kin, or *cestui que trust* for the administration of the estate or the execution of the trusts.

also any executor, administrator or trustee against any one beneficiary.

Rule 39 provides that the Court or a judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit, and may make such order in any particular case as he may think just, for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Discretion of Court or judge as to adding parties;

also as to service of notice of judgment or order on persons not parties so as to bind them ;

Rule 40 provides that wherever, in any action for the administration of the estate of a deceased person a judgment or an order has been pronounced or made affecting the rights or interests of persons not parties to the action, the Court or judge may direct that any persons interested in the estate shall be served with notice of the judgment or order ; and after such notice such persons shall be bound by the proceedings, in the same manner as if they had originally been made parties, and shall be at liberty to attend the proceedings under the judgment or order. Any person so served may, within one month after such service, apply to the Court or judge to discharge, vary or add to the judgment or order.

also to proceed in absence of legal personal representative of any deceased person.

Rule 46 enables the Court or judge where any deceased person who was interested in the matter in question has no legal personal representative to proceed in the absence of any such person, and may appoint some person to represent his estate for all the purposes of the proceeding, and any order consequent thereon shall bind the estate of the deceased person.

It would seem that this last rule will not apply to the following cases (*t*) :—

1. Where the estate of the deceased person is that which is being administered in the suit ;

2. Where the interest of the deceased person is adverse to that of the plaintiff ;

3. Where the representative of the deceased person has active duties to perform.

Appearance on claims of persons not parties.

Rule 47 provides that except by leave no party other than the executor or administrator shall be entitled to appear either in Court or in chambers on the claim of any person not a party against the estate in respect of any debt or liability. Under this rule even the plaintiff creditor has no right to attend ; and under the general power of the Court liberty to attend the proceedings generally in reference to

(*t*) Moore *v.* Morris, (1871) L. R. 13 Eq. 139, 140, on corresponding section of Chancery Procedure Act, 15 & 16 Vict. c. 86, s. 44.

claims will not be granted to a creditor not a party even at his own expense (*u*).

Administration by Public Trustee.

Extensive administrative powers are given to the Public Trustee by the Public Trustee Act, 1906, and s. 3 (5) enables the Court where proceedings have been instituted for the administration of estates of small value to order that the estate shall be administered by the Public Trustee instead of the Court (*x*).

Sect. 2.—*Proceedings in the County Court.*

Extent of jurisdiction.

Actions may be brought in the County Court for administration or accounts relating to the estates of deceased persons. This jurisdiction is concurrent with the jurisdiction of the High Court, but is limited to estates not exceeding £500 in amount or value (*y*).

Orders for transfer.

A transfer may be ordered of proceedings in the High Court which might have been commenced in the County Court (*z*), but special reasons must be shown (*a*).

The predominating considerations on applications for transfer would seem to be convenience, delay, and expense, and consequently orders for transfer have been made where the majority of the claimants reside in the district in which the debtor resided, and the estate is believed to be insolvent, the County Court being the proper Bankruptcy Court (*b*).

Distributive share, or legacy under £50.

The County Court has also jurisdiction to order payment of a distributive share under an intestacy, or any legacy, not exceeding £50 (*c*).

Practice.

The practice in the County Court is assimilated to the practice of the High Court (*d*).

(*u*) *Re* Schwabacher, [1907] 1 Ch. 719.

(*x*) See Appendix.

(*y*) 51 & 52 Vict. c. 43, s. 67 (1).

(*z*) Sect. 69.

(*a*) Picard *v.* Hine, (1868) 18 L. T. 705. As to removal of action from County Court to High Court, see Challis *v.* Watson, [1913] 1 K. B. 547.

(*b*) Senhouse *v.* Mawson, (1885) 52 L. T. 745; *Re* York, (1887) 36 C. D. 233.

(*c*) Sect. 58.

(*d*) See Williams (10th ed.) 1686 *et seq.*, and Annual County Court Practice.

(3) *Proceedings in Bankruptcy.*

On petition.

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 53), s. 125, enables any creditor of a deceased debtor, whose debt would have been sufficient to support a bankruptcy petition, to present a petition in bankruptcy for the administration of the estate of the deceased debtor according to the law of bankruptcy, and an order for administration may be made accordingly (*e*).

By transfer.

The Act also authorises a transfer on the application of any creditor to the Court exercising jurisdiction in bankruptcy of proceedings commenced in any Court of Justice for the administration of the deceased debtor's estate on proof that the estate is insufficient to pay its debts.

Under s. 21 (2) of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), the power of transfer may be exercised without the application of any creditor, and whenever the Court is satisfied that the estate is insufficient to pay its debts. The transfer may be ordered after judgment for administration has been given (*f*).

The power to transfer is a discretionary power and not a power which the judge is bound to exercise whenever the estate is shown to be insolvent. The predominating considerations would seem to be convenience, delay, and expense. The circumstance that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which right would be recognised in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer (*g*).

Consolidation in partnership proceedings.

Where a member of a partnership dies insolvent and an order is made under s. 125 for the administration of his estate in bankruptcy, and afterwards the surviving partner becomes bankrupt, the Court has jurisdiction to direct the proceedings in the two estates to be consolidated (*h*).

(*e*) Creditors of a business carried on by the executor are not creditors of a deceased debtor under this rule: *Re* Kitson, [1911] 2 K. B. 109.

(*f*) *Re* York, *ubi sup.*

(*g*) *Re* Baker, (1890) 44 C. D. 262; and see *Re* Rhoades, [1899] 2 Q. B. 347.

(*h*) *Re* Greaves, [1904] 2 K. B. 493; and see *ante*, p. 416, as to the order of

Rights of execution creditors of the deceased.

The property which vests in the trustee under an administration order made under s. 125 and is to be administered for the benefit of the creditors of the deceased is the property of the deceased subject to any liabilities and rights which attached to it in his hands (*i*). With regard to an execution creditor, by s. 26 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), the writ of *fieri facias* or other writ of execution against goods binds the property in the goods as from the delivery of the writ to the sheriff, but not so as to prejudice a purchaser in good faith without notice. Under s. 62 (1) "goods" include all chattels personal other than things in action and money. It is only by s. 12 of the Judgments Act, 1838 (1 & 2 Vict. c. 110), that money, bank notes, negotiable instruments, and other securities for money can be seized and taken under a writ of *fi. fa.*, but it is merely a right to seize, and that right dies upon the death of the execution debtor and the money becomes the property of his personal representative, and it is too late then for the sheriff to do any act by way of seizing it (*k*).

application of the joint and separate estates in payment of creditors.

(*i*) Hasluck *v.* Clark, [1899] 1 Q. B. 699.

(*k*) Johnson *v.* Pickering, [1908] 1 K. B. 1; see also *ante*, p. 611.

APPENDIX.

THE PUBLIC TRUSTEE ACT, 1906.

6 Edw. VII. c. 55.

An Act to provide for the appointment of a Public Trustee and to amend the Law relating to the administration of Trusts.

Establishment of Public Trustee.

Office of public trustee.

1.—(1) There shall be established the office of public trustee.

(2) The public trustee shall be a corporation sole under that name, with perpetual succession and an official seal, and may sue and be sued under the above name like any other corporation sole, but any instruments sealed by him shall not, by reason of his using a seal, be rendered liable to a higher stamp duty than if he were an individual.

Powers and Duties of Public Trustee.

General powers and duties of public trustee.

2.—(1) Subject to and in accordance with the provisions of this Act and rules made thereunder, the public trustee may, if he thinks fit—

(a) act in the administration of estates of small value ;

(b) act as custodian trustee ;

(c) act as an ordinary trustee ;

(d) be appointed to be a judicial trustee ;

(e) be appointed to be the administrator of the property of a convict under the Forfeiture Act, 1870.

(2) Subject to the provisions of this Act, and to the rules made thereunder, the public trustee may act either alone or jointly with any person or body of persons in any capacity to which he may be appointed in pursuance of this Act, and

shall have all the same powers, duties, and liabilities, and be entitled to the same rights and immunities and be subject to the control and orders of the Court, as a private trustee acting in the same capacity.

(3) The public trustee may decline, either absolutely or except on the prescribed conditions, to accept any trust, but he shall not decline to accept any trust on the ground only of the small value of the trust property.

(4) The public trustee shall not accept any trust which involves the management or carrying on of any business, except in the cases in which he may be authorised to do so by rules made under this Act, nor any trust under a deed of arrangement for the benefit of creditors, nor the administration of any estate known or believed by him to be insolvent.

(5) The public trustee shall not accept any trust exclusively for religious or charitable purposes, and nothing in this Act contained, or in the rules to be made under the powers in this Act contained, shall abridge or affect the powers or duties of the official trustee of charity lands or official trustees of charitable funds.

(1) *In the Administration of Small Estates.*

Administration of small estates.

3.—(1) Any person who in the opinion of the public trustee would be entitled to apply to the Court for an order for the administration by the Court of an estate (*a*), the gross capital value (*b*) whereof is proved to the satisfaction of the public trustee to be less than one thousand pounds, may apply to the public trustee to administer the estate, and, where any such application is made and it appears to the public trustee that the persons beneficially entitled are persons of small means, the public trustee shall administer the estate, unless he sees good reason for refusing to do so.

(2) On the public trustee undertaking, by declaration in writing signed and sealed by him, to administer the estate the trust property other than stock shall, by virtue of this

(*a*) This section throughout applies only to estates of deceased persons and not to trusts under settlements, which are dealt with in Part (3), *post*, p. 692: *Re* Devereux, [1911] 2 Ch. 545.

(*b*) The gross capital value should be ascertained at the date of the application to the public trustee: *Ibid.*

Act, vest in him, and the right to transfer or call for the transfer of any stock forming part of the estate shall also vest in him, in like manner as if vesting orders had been made for the purpose by the High Court under the Trustee Act, 1893, and that Act shall apply accordingly. As from such vesting any trustee entitled under the trust to administer the estate shall be discharged from all liability attaching to the administration, except in respect of past acts :

Provided that—

(a) the public trustee shall not exercise the right of himself transferring the stock without the leave of the Court ; and

(b) this sub-section shall not apply to any copyhold land forming part of the estate, but the public trustee shall, as respects such land, have the like powers as if he had been appointed by the Court under section thirty-three of the Trustee Act, 1893, to convey the land, and section thirty-four of that Act shall apply accordingly.

(3) For the purposes of the administration the public trustee may exercise such of the administrative powers and authorities of the High Court as may be conferred on him by rules under this Act, subject to such conditions as may be imposed by the rules.

(4) Rules shall be made under this Act for enabling the public trustee to take the opinion of the High Court on any question arising in the course of any administration without judicial proceedings, and otherwise for making the procedure under this section simple and inexpensive.

(5) Where proceedings have been instituted in any Court for the administration of an estate, and by reason of the small value of the estate it appears to the Court that the estate can be more economically administered by the public trustee than by the Court, or that for any other reason it is expedient that the estate should be administered by the public trustee instead of the Court, the Court may order that the estate shall be administered by the public trustee, and thereupon (subject to any directions by the Court) this section shall apply as if the administration of the estate had been undertaken by the public trustee in pursuance of this section.

(2) *As Custodian Trustee.*

Custodian trustee.

4.—(1) Subject to rules under this Act the public trustee may, if he consents to act as such, and whether or not the number of trustees has been reduced below the original number, be appointed to be custodian trustee of any trust—

(a) by order of the Court made on the application of any person on whose application the Court may order the appointment of a new trustee ; or

(b) by the testator, settlor, or other creator of any trust ; or

(c) by the person having power to appoint new trustees.

(2) Where the public trustee is appointed to be custodian trustee of any trust—

(a) The trust property shall be transferred to the custodian trustee as if he were sole trustee, and for that purpose vesting orders may, where necessary, be made under the Trustee Act, 1893 :

(b) The management of the trust property and the exercise of any power or discretion exerciseable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee (which trustees are herein-after referred to as the managing trustees) :

(c) As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property, but the managing trustees shall have free access thereto and be entitled to take copies thereof or extracts therefrom :

(d) The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them (including the power to pay money or securities into Court), unless the matter in which he is requested to concur is a breach of trust, or involves a personal liability upon him in respect of calls or otherwise, but unless he

so concurs, the custodian trustee shall not be liable for any act or default on the part of the managing trustees or any of them :

(e) All sums payable to or out of the income or capital of the trust property shall be paid to or by the custodian trustee : Provided that the custodian trustee may allow the dividends and other income derived from the trust property to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case shall be exonerated from seeing to the application thereof, and shall not be answerable for any loss or misapplication thereof :

(f) The power of appointing new trustees, when exerciseable by the trustees, shall be exerciseable by the managing trustees alone, but the custodian trustee shall have the same power of applying to the Court for the appointment of a new trustee as any other trustee :

(g) In determining the number of trustees for the purpose of the Trustee Act, 1893, the custodian trustee shall not be reckoned as a trustee :

(h) The custodian trustee, if he acts in good faith, shall not be liable for accepting as correct and acting upon the faith of any written statement by the managing trustees as to any birth, death, marriage, or other matter of pedigree or relationship, or other matter of fact, upon which the title to the trust property or any part thereof may depend, nor for acting upon any legal advice obtained by the managing trustees independently of the custodian trustee :

(i) The Court may, on the application of either the custodian trustee, or any of the managing trustees, or of any beneficiary, and on proof to their satisfaction that it is the general wish of the beneficiaries, or that on other grounds it is expedient to terminate the custodian trusteeship, make an order for that purpose, and the Court may thereupon

make such vesting orders and give such directions as under the circumstances may seem to the Court to be necessary or expedient.

(3) The provisions of this section shall apply in like manner as to the public trustee to any banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee, with power for such company or body corporate to charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the public trustee as custodian trustee.

(3) *As an Ordinary Trustee.*

Appointment of public trustee to be trustee, executor, &c.

5.—(1) The public trustee may by that name, or any other sufficient description, be appointed to be trustee of any will or settlement or other instrument creating a trust or to perform any trust or duty belonging to a class which he is authorised by the rules made under this Act to accept, and may be so appointed whether the Will or settlement or instrument creating the trust or duty was made or came into operation before or after the passing of this Act, and either as an original or as a new trustee, or as an additional trustee, in the same cases, and in the same manner, and by the same persons or Court, as if he were a private trustee, with this addition, that, though the trustees originally appointed were two or more, the public trustee may be appointed sole trustee (*c*).

(2) Where the public trustee has been appointed a trustee of any trust, a co-trustee may retire from the trust under and in accordance with section eleven of the Trustee Act, 1893, notwithstanding that there are not more than two trustees, and without such consents as are required by that section.

(3) The public trustee shall not be so appointed either as a new or additional trustee where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary, unless the Court otherwise order.

(4) Notice of any proposed appointment of the public trustee either as a new or additional trustee shall where

(*c*) Although trustees who are desirous of retiring can appoint the public trustee, they ought only to resort to the powers of the Act if there is no other way out of the difficulty which has arisen: *Re* Hope Johnstone's Settlement Trusts, (1909 25 T. L. R. 369.

practicable be given in the prescribed manner to all persons beneficially interested who are resident in the United Kingdom and whose addresses are known to the persons proposing to make the appointment, or, if such beneficiaries are infants, to their guardians, and if any person to whom such notice has been given within twenty-one days from the receipt of the notice applies to the Court, the Court may, if having regard to the interests of all the beneficiaries it considers it expedient to do so, make an order prohibiting the appointment being made (*d*), provided that a failure to give any such notice shall not invalidate any appointment made under this section.

Power as to granting probate.

6.—(1) If in pursuance of any rule under this Act, the public trustee is authorised to accept by that name probates of Wills or letters of administration, the Court having jurisdiction to grant probate of a Will or letters of administration may grant such probate or letters to the public trustee by that name, and for that purpose the Court shall consider the public trustee as in law entitled equally with any other person or class of persons to obtain the grant of letters of administration, save that the consent or citation of the public trustee shall not be required for the grant of letters of administration to any other person, and that, as between the public trustee and the widower, widow, or next-of-kin of the deceased, the widower, widow, or next-of-kin shall be preferred, unless for good cause shown to the contrary.

(2) Any executor who has obtained probate or any administrator who has obtained letters of administration, and notwithstanding he has acted in the administration of the deceased's estate, may, with the sanction of the Court, and after such notice to the persons beneficially interested as the Court may direct, transfer such estate to the public trustee for administration either solely or jointly with the continuing executors or administrator, if any. And the order of the Court sanctioning such transfer shall, subject to the provisions of this Act, give to the public trustee all the powers of

(*d*) An order prohibiting the appointment will not be made unless the Court, having regard to the interests of all the beneficiaries, considers it expedient to make the order. The expense, not exceptiona or disproportionate, cannot be treated as a material element: *Re* Firth, [1912] 1 Ch. 806.

such executor and administrator, and such executor and administrator shall not be in any way liable in respect of any act or default in reference to such estate subsequent to the date of such order, other than the act or default of himself or of persons other than himself for whose conduct he is in law responsible.

Liability : Officers and Offices : Fees.

Liability of Consolidated Fund.

7.—(1) The Consolidated Fund of the United Kingdom shall be liable to make good all sums required to discharge any liability which the public trustee, if he were a private trustee, would be personally liable to discharge, except where the liability is one to which neither the public trustee nor any of his officers has in any way contributed, and which neither he nor any of his officers could by the exercise of reasonable diligence have averted, and in that case the public trustee shall not, nor shall the Consolidated Fund, be subject to any liability.

(2) All sums payable in pursuance of this section out of the Consolidated Fund shall be charged on and issued out of that fund or the growing produce thereof.

Officers and offices.

8.—[This section relates to the appointment to the office of public trustee and of his officers, also to the salary or remuneration of the public trustee and his officers and the expenses of carrying the Act into effect.]

Fees charged by public trustee

9.—(1) [Authorises such fees being charged as the Treasury with the sanction of the Lord Chancellor may fix.]

(2) Any expenses which might be retained or paid out of the trust property if the public trustee were a private trustee shall be so retained or paid, and the fees shall be retained or paid in the like manner as and in addition to such expenses.

(3) and (4) [Regulate the appropriation of fees.]

(5) The incidence of the fees and expenses under this section as between capital and income shall be determined by the public trustee.

Supplemental Provisions as to Public Trustee.

Appeal to the Court.

10.—(1) A person aggrieved by any act or omission or decision of the public trustee in relation to any trust may

apply to the Court, and the Court may make such order in the matter as the Court thinks just (*e*).

(2) Subject to rules of Court, an application under this section to the High Court shall be made to a judge in the Chancery Division of the High Court in Chambers.

Mode of action of public trustee.

11.—(1) The public trustee shall not, nor shall any of his officers, act under this Act for reward, except as provided by this Act.

(2) The public trustee may, subject to the rules made under this Act, employ for the purposes of any trust such solicitors, bankers, accountants, and brokers or other persons as he may consider necessary, and in determining the persons to be so employed in relation to any trust the public trustee shall have regard to the interests of the trust, but subject to this shall, whenever practicable, take into consideration the wishes of the creator of the trust and of the other trustees (if any) and of the beneficiaries, either expressed or as implied by the practice of the creator of the trust, or in the previous management of the trust.

(3) On behalf of the public trustee such person as may be prescribed may take any oath, make any declaration, verify any account, give personal attendance at any Court or place, and do any act or thing whatsoever which the public trustee is required or authorised to take, make, verify, give or do: Provided that nothing in this Act or in any rule made under this Act shall confer upon any person not otherwise entitled thereto any right to appear, or act, or be heard in or before any Court or tribunal, on behalf or instead of the public trustee, or to do any act whatsoever on behalf or on the instructions of the public trustee, which could otherwise only be lawfully done by a barrister, or a duly certificated solicitor.

(4) Where any bond or security would be required from a private person upon the grant to him of administration, or upon his appointment to act in any capacity, the public trustee, if administration is granted to him or if he is appointed to act in such capacity as aforesaid, shall not be

(*e*) This section applies to all decisions of the public trustee in discharge of his judicial functions under the Act: *Re* Oddy, [1911] 1 Ch. 532.

required to give such bond or security, but shall be subject to the same liabilities and duties as if he had given such bond or security.

(5) The entry by the public trustee by that name in the books of a company shall not constitute notice of a trust, and a company shall not be entitled to object to enter the name of the public trustee on its books by reason only that the public trustee is a corporation, and, in dealings with property, the fact that the person or one of the persons dealt with is the public trustee, shall not of itself constitute notice of a trust.

Application of Act to Palatine Courts.

12. The provisions of this Act with respect to the High Court shall, in their application to cases within the jurisdiction of a Palatine Court, include that Court, and the public trustee shall provide an address within the county palatine where service upon him of any proceedings under this Act in such Palatine Court may be effected ; the rules of Court relating to the exercise of the jurisdiction of a Palatine Court under this Act shall be made by the authority having power to make general rules and orders of that Court.

Investigation and Audit of Trust Accounts.

Investigation and audit of trust accounts.

13.—(1) Subject to rules under this Act and unless the Court otherwise orders, the condition and accounts of any trust shall, on an application being made and notice thereof given in the prescribed manner by any trustee or beneficiary, be investigated and audited by such solicitor or public accountant as may be agreed on by the applicant and the trustees or, in default of agreement, by the public trustee or some person appointed by him :

Provided that (except with the leave of the Court) such an investigation or audit shall not be required within twelve months after any such previous investigation or audit, and that a trustee or beneficiary shall not be appointed under this section to make an investigation or audit.

(2) The person making the investigation or audit (hereinafter called the auditor) shall have a right of access to the books, accounts, and vouchers of the trustees, and to any securities and documents of title held by them on account of the trust, and may require from them such information and

explanation as may be necessary for the performance of his duties, and upon the completion of the investigation and audit shall forward to the applicant and to every trustee a copy of the accounts, together with a report thereon, and a certificate signed by him to the effect that the accounts exhibit a true view of the state of the affairs of the trust and that he has had the securities of the trust fund investments produced to him and verified by him or (as the case may be) that such accounts are deficient in such respects as may be specified in such certificate.

(3) Every beneficiary under the trust shall, subject to rules under this Act, be entitled at all reasonable times to inspect and take copies of the accounts, report, and certificate, and, at his own expense, to be furnished with copies thereof or extracts therefrom.

(4) The auditor may be removed by order of the Court, and, if any auditor is removed, or resigns, or dies, or becomes bankrupt or incapable of acting before the investigation and audit is completed, a new auditor may be appointed in his place in like manner as the original auditor.

(5) The remuneration of the auditor and the other expenses of the investigation and audit shall be such as may be prescribed by rules under this Act, and shall, unless the public trustee otherwise directs, be borne by the estate ; and, in the event of the public trustee so directing, he may order that such expenses be borne by the applicant or by the trustees personally or partly by them and partly by the applicant (*f*).

(6) If any person having the custody of any documents to which the auditor has a right of access under this section fails or refuses to allow him to have access thereto or in anywise obstructs the investigation or audit, the auditor may apply to the Court, and thereupon the Court shall make such order as it thinks just.

(7) Subject to rules of Court, applications under or for the purposes of this section to the High Court shall be made to a judge of the Chancery Division in Chambers.

(*f*) Before making an order for payment of the costs of an audit otherwise than out of the trust estate the public trustee should hear the parties if they desire to be heard : *Re* Oddy, [1911] 1 Ch. 532.

(8) If any person in any statement of accounts, report, or certificate required for the purposes of this section wilfully makes a statement false in any material particular, he shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, and on summary conviction to imprisonment for a term not exceeding six months, with or without hard labour, and in either case to a fine in lieu of or in addition to such punishment.

RULES : DEFINITIONS : SHORT TITLE AND EXTENT.

Rules.

14.—(1) The Lord Chancellor shall, with the concurrence of the Treasury, make rules for carrying into effect the objects of this Act, and in particular for all or any of the following purposes (that is to say) :—

(a) establishing the office of public trustee and prescribing the trusts or duties he is authorised to accept or undertake, and the security, if any, to be given by the public trustee and his officers :

(b) the transfer to and from the public trustee of any property :

(c) the accounts to be kept and an audit thereof :

(d) the establishment and regulation of any branch office :

(e) excluding any trusts from the operation of this Act or any part thereof :

(f) the classes of corporate bodies entitled to act as custodian trustees :

(g) the form and manner in which notices under this Act shall be given.

(2) Every rule under this Act shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament, within the next subsequent thirty days on which the House has sat next after any such rule is laid before it, praying that the rule may be annulled, His Majesty in Council may annul the rule, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

(3) If the rules require a declaration to be made for any purpose, a person who makes such declaration, knowing the

same to be untrue in any material particular, shall be guilty of a misdemeanour.

Definitions.

15. In this Act, unless the context otherwise requires,—

the expression "Court" means the High Court and, as respects trusts within its jurisdiction, the County Court :

the expression "letters of administration" means letters of administration of the estate and effects of a deceased person, whether general or with a Will annexed, or limited either in time or otherwise :

the expression "trust" includes an executorship or administratorship ; and the expression "trustee" shall be construed accordingly ; and the expression "trust property" shall include all property in the possession or under the control wholly or partly of the public trustee by virtue of any trust :

the expression "private trustee" means a trustee other than the public trustee :

the expression "expenses" includes costs and charges :

the expression "prescribed" means prescribed for the time being by rules under this Act :

other expressions have the same meaning as in the Trustee Act, 1893.

Commencement of Act.

16. This Act shall come into operation on the first day of January one thousand nine hundred and eight.

Short title and extent.

17.—(1) This Act may be cited as the Public Trustee Act, 1906.

(2) This Act shall not extend to Ireland or Scotland.

THE PUBLIC TRUSTEE RULES, 1907.

Interpretation.

1. In these rules the expression "the Act" means the Public Trustee Act, 1906 ; and unless there is anything in the context or in the Act inconsistent therewith—

The expression "trust instrument" includes any instrument by which a trust is created ;

The expression "trust property" includes all property subject to a trust, or comprised in an estate, which is proposed to be administered by the public trustee ;

The expression "deputy" means a deputy public trustee.

2. The Interpretation Act, 1889, applies for the purpose of the interpretation of these rules as it applies for the purpose of the interpretation of an Act of Parliament.

Establishment of Office.

3. The office of public trustee is hereby established.

Offices.

4.—(1) The central office of the public trustee shall be situate in London.

(2) Branch offices may from time to time be established as may be prescribed by the Lord Chancellor by notice in the *London Gazette.*

Deputy Public Trustees.

5. There shall be deputy public trustees at any branch offices so established, who shall be officers of the public trustee, and shall have the powers and perform the duties assigned to them by or under these rules. Their number shall be such as the Lord Chancellor, with the sanction of the Treasury, may from time to time prescribe, and every such appointment shall be notified in the *London Gazette.*

Security.

6. Security shall be given by such persons employed under the Act as the Treasury may direct for the due performance of their duties, and for the due accounting for and

payment of all moneys received by them in pursuance of the Act and these rules. The security shall be for such sum and shall be given in such manner and form as the Treasury shall order in the case of each such person, and the Treasury may at any time require that the amount or nature of any such security be varied.

Trusteeships.

7.—(1) Subject to the Act and these rules the public trustee is authorised—

(a) to accept as ordinary trustee and to act as custodian trustee of any trust created by any trust instrument or arising upon an intestacy ; and

(b) to accept by the name of the public trustee probates or letters of administration of any kind.

Provided that he shall not accept the trusts of any instrument made solely by way of security for money.

8. The public trustee may if he thinks fit—

(1) act as custodian trustee of a trust which involves the management or carrying on of any business, but upon the conditions that (a) he shall not act in the management or carrying on of such business, and (b) he shall not hold any property of such a nature as will expose the holder thereof to any liability except under exceptional circumstances and when he is satisfied that he is fully indemnified or secured against loss ; and

(2) accept as ordinary trustee under exceptional circumstances a trust which involves the management or carrying on of any business, but upon the conditions that except with the consent of the Treasury he shall only carry on the same (a) for a short time not exceeding eighteen months, and (b) with a view to sale or disposition or winding-up, and (c) if satisfied that the same can be carried on without risk of loss.

9.—(1) A testator may appoint the public trustee to be trustee or custodian trustee under any testamentary instrument without previously applying to him for his consent to act as such.

(2) No such appointment by a testator shall have effect,

and no appointment of the public trustee to be trustee or custodian trustee shall be made except by a testator, unless and until (in either case) the consent of the public trustee to act as such trustee shall have been applied for and obtained in accordance with these rules. Provided that in the case of any such appointment by a testator the public trustee shall at any time after the fact of his appointment shall have come to his knowledge be at liberty to act as if such application had been received by him.

10.—(1) An application to the public trustee to act as trustee or custodian trustee may be made

(a) where the appointment has been made by a testator —by any trustee or beneficiary under the testamentary instrument ; and

(b) in the case of the estate of an intestate—by any person appearing to be beneficially interested in the estate ; and

(c) in any case—by the persons or any one of the persons having power under the Act to make the appointment.

(2) It shall be the duty of any person appointed by a testator to be co-trustee with the public trustee, and not renouncing or disclaiming the trust, to give to the public trustee notice in writing of such appointment as soon as practicable after the same has come to his knowledge.

11.—(1) Any application under the last preceding rule shall be made in writing addressed to the public trustee at his office in London, or any branch office for the time being in existence, and may be left at or sent by post to any such office as aforesaid.

(2) Upon receiving any such application the public trustee may require to be produced to him the trust instrument (if any), and may require to be supplied to him a copy of that instrument, and of any other document affecting the trust, and such particulars as to the nature and value of the trust property, and the liabilities (if any) attaching to such property, or the holder thereof, and the names and places of abode of any beneficiaries and trustees under the trust, and such other information relating to the trust as he may consider it desirable to obtain in any particular case.

12. As soon as may be after receiving any such application the public trustee shall take into consideration upon such evidence as may appear to him sufficient—

(a) the gross capital value of the trust property ;

(b) the mode of investment and the condition of the trust property ;

(c) the situation, tenure, and character of any land comprised in the trust property ;

(d) any liabilities attaching to the trust property or the holder thereof ;

(e) the places of abode and circumstances of the beneficiaries ; and

(f) all the circumstances of the case.

13.—(1) Upon any application the public trustee shall decide whether the same ought to be accepted or refused, and shall forthwith give notice to the applicant of such acceptance or refusal, and in case of acceptance shall execute an instrument expressing his consent to act in the trust.

(2) Upon the acceptance of any application the public trustee shall consider and determine whether the trust shall be administered from his central office or from a branch office, and shall give directions accordingly, and any such direction may at any time be rescinded or varied by the public trustee at his discretion.

Administration of Small Estates.

14.—(1) An application under s. 3 (1) of the Act shall be made in the manner provided by Rule 11 hereinbefore contained.

(2) Upon receiving any such application the public trustee shall require to be supplied to him such evidence as to the value of the estate, and the circumstances of the persons beneficially entitled, and such other information relating thereto as he may consider it desirable to obtain in any particular case.

15.—(1) If it is not proved to the satisfaction of the public trustee that the gross capital value of the estate is less than £1,000, or if it does not appear to him that the persons beneficially entitled are persons of small means, or if he sees any other good reason for refusing the application, he shall

refuse the same, and shall forthwith give notice to the applicant of such refusal.

(2) In any other case the public trustee shall make in respect of the estate the declaration mentioned in s. 3 (2) of the Act, and shall give notice to the applicant that the application is accepted, and shall take such other steps as may be necessary or proper to enable him to administer the estate ; and any person having the custody of the probate or letters of administration or other document relating to the estate shall, upon the request in writing of the public trustee, deliver the same to him or as he shall direct.

(3) A refusal under this rule shall not prevent the public trustee from exercising with respect to the estate any powers (other than powers under s. 3 of the Act) exerciseable by him with respect thereto under the Act and these rules, if duly appointed to exercise the same.

(4) Upon the acceptance of any application the public trustee shall consider and determine whether the estate shall be administered from his central office or from a branch office, and shall give directions accordingly, and any such direction may at any time be rescinded or varied by the public trustee at his discretion.

16. For the purposes of the administration the public trustee shall (subject as hereinafter provided) have all the administrative powers and authorities exerciseable by a master of the Supreme Court acting in the administration of an estate.

17.—(1) The public trustee may in manner hereinafter provided and without judicial proceedings take the opinion of the High Court upon any question arising in the course of an administration.

(2) The duty of advising upon any such question shall be assigned by the Lord Chancellor to a particular judge of the Chancery Division. Provided that in the absence or upon the request of such judge any other judge of that Division, and during vacation any judge of the High Court, may act for such judge for the purposes of this rule.

(3) Any such question shall be submitted to the judge in such manner and at such time as he may direct, and shall be accompanied by such statement of facts, documents, and

other information as he may require, and the public trustee shall, if the judge so desires, attend upon him at such time and place as the judge may appoint.

(4) The judge may before giving his opinion require the attendance of, or communicate with, any person interested in the estate as trustee or beneficiary, but no such person shall have a right to be heard by the judge unless he otherwise directs.

(5) The judge shall give his opinion to the public trustee, and the public trustee shall act in accordance with such opinion, and shall upon the request in writing of any such interested person communicate to him the effect of such opinion.

Administration of Trusts and Estates.

18. Subject to the provisions of the Act and of these rules and to the terms of any particular trust the public trustee may, in the administration of any trust or estate, take and use professional advice and assistance in regard to legal and other matters, and may act on credible information (though less than legal evidence) as to matters of fact.

19.—(1) There shall be kept at the central office in London of the public trustee a register (hereinafter referred to as "the principal register") of all trusts in which the public trustee is acting as trustee or custodian trustee and of estates in course of administration under s. 3 of the Act, and whether the same are being administered from his central office or from any branch office.

(2) There shall be entered in the principal register in respect of each trust or estate—

(a) a distinctive letter and number;
(b) the date of the acceptance of the trust or of the declaration made under s. 3 (2) of the Act;
(c) particulars of the trust property from time to time;
(d) the names and place of abode of the person in receipt of the income of the trust property;
(e) a reference to any notice received of any dealing with any beneficial interest in the trust property and of any exercise or release of any power relating to the trust or estate;

(f) a record of any decision or opinion of the High Court in respect of the trust or estate ;

(g) such records of his decisions and such other particulars as the public trustee may think fit.

20. The public trustee may invest or retain invested money belonging to any trust or estate and coming to his hands in any investment authorised by the trust instrument or (save as otherwise provided by that instrument) authorised by law for the investment of trust funds and may (save as so provided) retain any investment existing at the date of the commencement of the trust, or (where the trust arises on an intestacy) at the date of the death of the intestate. Provided that he shall not invest in or hold any investment in such manner as to expose him to liability as the holder thereof, unless he is satisfied that he is fully indemnified or secured against loss.

21. The securities and documents belonging or relating to a trust or estate of which the public trustee is a trustee or which he is administering shall if under his control be kept at the bank to the trust or at some other safe place of deposit allowed generally or specially by the Treasury, so far as the convenience of business will admit.

22.—(1) A separate account shall be kept for every trust or estate.

(2) A separate account shall be kept of the capital of the trust property and of the mode in which it is from time to time invested, and all dealings with such capital shall be entered in such account.

(3) A separate account shall be kept of the income of the trust property and of the mode in which it is from time to time dealt with by the public trustee.

23. The accounts of the public trustee shall be audited and the securities held by him verified from time to time to the satisfaction of the controller and auditor-general, in accordance with such regulations as the Treasury may make.

24. All payments of money to or from the capital of the trust property shall be made through the bank to the trust or estate.

25.—(1) No transfer by the public trustee of any securities or assurance by him of any land forming part of the trust

property shall be made except under the hand and official seal of the public trustee, or under the hand and seal of an officer of the public trustee authorised in writing by him to act in that behalf either generally or in any particular case.

(2) Any such transfer or assurance by an officer so authorised shall have the same effect as if the same were made by the public trustee under his hand and official seal.

26. All sums payable out of the income or capital of the trust property shall be made by a cheque on a bank signed by the public trustee or an officer of the public trustee authorised in writing by him to act in that behalf either generally or in any particular case. Provided that in any particular case the public trustee may authorise the payment of income by the person liable to pay the same direct to the person entitled to receive the same, or on his bank.

27.—(1) The income of the trust property may be paid to the person for the time being entitled to receive the same either through a bank or direct, and where such person is a married woman may be so paid notwithstanding any restraint on anticipation.

(2) Where authority is given to any corporation or bank to pay any income to any person the books of that corporation or bank showing the payment of that income in accordance with the authority shall be a sufficient discharge to the public trustee.

(3) Where authority is given to any person to pay any income to the bank of the person entitled, the certificate of that bank stating the receipt of that income shall be a sufficient discharge to the public trustee.

(4) Where any person is solely entitled to receive any income, without any restraint on anticipation, the public trustee may, on the request in writing of that person, authorise him for such period as the public trustee may think fit to collect or arrange for the collection of such income. During the continuance of any such authority such request in writing shall be a sufficient discharge to the public trustee in respect of such income.

28. The public trustee may, if the special circumstances of the case appear to him to render it desirable, pay to his co-trustee, or allow him to receive, the income of the trust

property or any part thereof, on such co-trustee undertaking to apply it in manner directed by the trust.

29. The public trustee may make advances for the purposes of any trust or estate in course of administration, or about to be administered, by him, out of any moneys which may be placed at his disposal by the Treasury for that purpose, and upon such terms as he may think proper.

30. The public trustee may at any time require a statutory declaration or other sufficient evidence that a person is alive and is the person to whom any money or property is payable or transferable, and may refuse payment or transfer until such declaration or evidence is produced.

31. Where a person appearing to be beneficially entitled to any sum of money under a trust or to be interested in the trust property cannot be found, or it is not known whether he is living or dead, the public trustee may apply to the Court for directions as to the course to be taken with reference to such person, and until an order of the Court is made shall keep any sum payable to such person, and if it is kept for more than six months shall invest the same or deposit the same at interest and shall accumulate the dividends or interest thereof.

32. Upon an application in writing by or with the authority of any person interested in the trust property the public trustee—

(a) shall permit the applicant or his solicitor or other authorised agent to inspect and take copies of any entry in any register relating to the trust or estate and (so far as the interest of the applicant in the trust property is or may be affected thereby) of any account, notice, or other document in the custody of the public trustee ;

(b) shall at the expense of the applicant supply him or his solicitor or other authorised agent with a copy of any such entry, account, or document as aforesaid, or of any extract therefrom ;

(c) shall give to such applicant or his solicitor or other authorised agent such information respecting the trust or estate and the trust property as shall be reasonably requested in the application

and shall be within the power of the public trustee.

(2) Subject as aforesaid the public trustee shall observe strict secrecy in respect of every trust or estate in course of administration by him.

33.—(1) The public trustee may in writing authorise any deputy to exercise and perform (either generally or in relation to any particular case and subject to such conditions and restrictions (if any) as the public trustee may impose) all or any of the powers and duties of the public trustee under any of the foregoing rules, except—

(a) the power or duty of determining whether a trust or estate shall be administered from his central office or from a branch office ; and

(b) the powers of authorising officers of the public trustee to transfer securities or assure land or to sign cheques ;

(c) the power of making advances for the purpose of any trust or estate.

(2) Any such authority, conditions, or restrictions may at any time in like manner be withdrawn or varied by the public trustee at his discretion.

34. No deputy and no firm or member of a firm of solicitors of which such deputy is a member shall, except with the consent in writing of the public trustee, and subject to such conditions as he may impose, act as solicitor or solicitors to a trust or estate which is in course of administration by such deputy.

35. Any officer of the public trustee who shall be authorised by him in writing in that behalf may take any oath, make any declaration, verify any account, and give personal attendance at any Court or place.

Corporate Bodies as Custodian Trustees.

36.—(1) The bodies corporate entitled to act as custodian trustee shall be any such incorporated banking or insurance or guarantee or trust company or friendly society and any such body corporate established for charitable or philanthropic purposes as may be approved by the public trustee and the Treasury.

(2) The public trustee may require payment by any applicant for such approval of a fee not exceeding ten guineas.

(3) Such approval may be granted subject to such conditions as to the rendering by the body corporate, and verification, of periodical returns of business transacted, and fees and other emoluments received, and otherwise, as the Treasury may require either generally or in any particular case.

(4) Any such approval may at any time be withdrawn without reason assigned.

Investigation and Audit of Trust Accounts.

37. Any application under s. 13 (1) of the Act shall be made to the public trustee, and notice thereof shall be given (a) if the applicant is a beneficiary, to every trustee, and (b) if the applicant is a trustee, to each co-trustee and also to the person entitled to the receipt of the income of the trust property.

38. If within three months from the date of the receipt of the notice no solicitor or public accountant shall have been appointed by the applicant and the trustees to conduct the investigation and audit, there shall be deemed to be a default of agreement within the meaning of s. 13 (1) of the Act, and the applicant may apply to the public trustee accordingly.

39. The remuneration of the auditor and other expenses of the investigation and audit shall be such as may be agreed on by the trustees and the person entitled to the receipt of the income of the trust property and the auditor, or (in default of such agreement) determined by the public trustee, who shall, in determining the same, have regard to the estimated value of the trust property, the time occupied or likely to be occupied by the investigation and audit, and the other circumstances of the case.

Miscellaneous.

40.—(1) Any notice or application required to be given or made for the purposes of the Act or these rules to the public trustee may be addressed to the public trustee at his office in London, or if the same relates to a trust or estate

in course of administration or proposed to be administered from a branch office, then at that branch office.

(2) Any notice or application required to be given or made for the purposes of the Act or these rules to any person other than the public trustee may be addressed to that person at his last known place of abode or place of business.

(3) Any such notice or application may be delivered at the place to which it is addressed or may be served by post.

41. Where any person who (if not under disability) might have made any application, given consent, done any act, or been party to any proceeding in pursuance of these rules is an infant, idiot or lunatic, the guardian or (as the case may require) the committee or receiver of the estate of such person may make such application, give such consent, do such act, and be party to such proceedings as such person if free from disability might have made, given, done, or been party to, and shall otherwise represent such person for the purposes of these rules. Where there is no guardian or committee or receiver of the estate of any such infant, idiot or lunatic, or where any person is of unsound mind or incapable of managing his affairs, but has not been found lunatic under any inquisition, it shall be lawful for the Court to appoint a guardian of such person for the purpose of any proceedings under these rules, and from time to time to change such guardian.

42. The public trustee may frame and cause to be printed and circulated or otherwise promulgated such forms and directions as he may deem requisite or expedient for facilitating proceedings under the Act and these rules.

43. These rules may be cited as "The Public Trustee Rules, 1907."

THE PUBLIC TRUSTEE (FEES) ORDER, 1907.

1. In this order and in the schedule hereto (unless the context otherwise requires)—

(a) Words to which a meaning is assigned by the Public Trustee Rules, 1907, shall have the same respective meanings as in those rules.

(b) Words referring to the acceptance of a trust shall

be deemed to include a reference to an undertaking to administer an estate under s. 3 of the Act.

2. The Interpretation Act, 1889, applies for the purpose of the interpretation of this order as it applies for the purpose of the interpretation of an Act of Parliament.

3. Subject as hereinafter provided the fees mentioned in the schedule to this order shall be paid in respect of the duties in that schedule referred to.

4. If at any time during the continuance of a trust in course of administration by the public trustee any property (not arising from the accumulation of income of the trust property) shall become subject to the trust, in addition to the property comprised therein at the date of the acceptance thereof, there shall be paid in respect of such additional property a further fee of such amount as would have been payable upon the acceptance of a trust comprising such additional property only.

5.—(1) Where it appears to the public trustee, upon accepting a trust, that the trust property consists wholly or partially of reversionary interests, or other property not in possession or not readily realizable (all which interests and property are in this clause referred to as " the reversionary property ") he may charge an additional fee, not exceeding one pound, upon acceptance of the trust.

(2) Where such additional fee is charged, then—

(a) Upon the acceptance of the trust the reversionary property shall be excluded from the trust property for the purpose of ascertaining the amount of the fee payable in pursuance of the schedule hereto upon such acceptance, and the said fee shall be calculated and paid as if the trust property (if any) other than the reversionary property were alone comprised in the trust ; and

(b) So far as regards the reversionary property, or any part thereof, the date on which the same falls into possession or is realized shall, for the purpose of ascertaining the amount of any capital fee payable in pursuance of the schedule hereto, be deemed to be the date of the acceptance of the

trust, and the fee payable on such acceptance shall be payable at the first-mentioned date ; and

(c) For the purpose of ascertaining the amount of the fee payable on such acceptance in respect of the reversionary property or any part thereof, the gross capital value of that property or part at the date at which such fee is payable shall be aggregated with the gross capital value of any other part of the trust property in respect of which the fee on acceptance has been previously paid.

6.—(1) In any case in which it appears to the public trustee that the circumstances of a trust or estate in course of administration, or proposed to be administered, by him are, or probably will be, such as to render his duties in relation thereto exceptionally onerous, he may, with the approval of the Treasury, charge a special fee in respect of the performance of such duties, in addition to the fees payable in pursuance of the schedule hereto.

(2) The public trustee may make the payment of, or agreement to pay, such special fee a condition of his accepting a trust or undertaking to administer an estate.

7. In any case in which it appears to the public trustee that the circumstances of a trust or estate in course of administration, or proposed to be administered, by him are, or probably will be, such as to render his duties in relation thereto exceptionally simple, or are otherwise of an exceptional character, he may with the approval of the Treasury remit any part (not exceeding one-half) of any fee payable in respect of the performance of such duties in pursuance of the schedule hereto.

8. The public trustee may, in his discretion, upon the application of any person appearing to be interested in the capital of the trust property, commute any fee which in pursuance of the schedule hereto would, but for the commutation, become payable upon the withdrawal or distribution of the whole or any part of that capital for a certain sum to be presently paid : and for determining that sum he shall cause a present value to be set on that fee, regard being had to the circumstances and contingencies affecting the rate at which,

and the occasion upon which, such fee would, but for the commutation, be payable, and interest being reckoned at 3 per cent.

9. The public trustee may, with the approval of the Treasury, agree to any mode of payment of any fee payable in pursuance of the schedule hereto which shall seem to him just and reasonable.

10. For the purposes of the schedule hereto—(a) the value of any property (other than cash) shall be the price which in the opinion of the public trustee such property would fetch if sold in the open market; and (b) income where the same is derived from the carrying on of any trade or business shall mean the gross receipts of such trade or business.

11. This order may be cited as "The Public Trustee (Fees) Order, 1907."

Schedule.

I.—Capital Fees.

A.—*In respect of the duties of the public trustee acting in the administration of a small estate under s. 3 of the Act.*

1. Upon the acceptance of the trust—a fee at the rate of 10*s.* for every £100 of the gross capital value of the estate as proved for the purposes of s. 3 (1) of the Act.

2. Upon the making of an order under s. 3 (5) of the Act—a fee at the rate of 10*s.* for every £100 of the gross capital value of the estate at the date of the order.

3. Upon the withdrawal (whether upon distribution amongst the beneficiaries or otherwise) of any capital from the estate—a fee at the rate of 10*s.* for every £100 of the value of the capital withdrawn.

B.—*In respect of the duties of the public trustee acting as ordinary trustee or executor or administrator (except in cases provided for under heads A or D).*

1. Upon the acceptance of the trust—a fee at the following rates :—

(a) if the gross capital value of the trust property at the

date of such acceptance does not exceed £1,000 —15*s.* per cent. in respect of that value ; and

(b) if such gross capital value at the said date exceeds £1,000 then—

15*s.* per cent. in respect of that value up to £1,000.

5*s.* 0*d.* per cent. in respect of any excess of that value over £1,000 up to £20,000.

2*s.* 6*d.* per cent. in respect of any excess of that value over £20,000 up to £50,000.

1*s.* 3*d.* per cent. in respect of any excess of that value over £50,000.

2. Upon the withdrawal (whether upon distribution amongst the beneficiaries or otherwise) of any capital from the trust property—a fee at a rate, for every £100 or part of £100, of the value of the property withdrawn, equal to the rate per cent. at which the fee upon the acceptance of the trust was payable in respect of the entire trust property.

3. Provided that the fees chargeable under the two preceding clauses of this head shall be so regulated that the total fees so chargeable in respect of a trust shall not be less than £5.

C.—*In respect of the duties of the public trustee acting as custodian trustee only (except in cases provided for under head* D).

Upon any occasion mentioned under head B, one half of the fee payable under that head upon that occasion.

D.—*In respect of the duties of the public trustee acting as ordinary trustee, or custodian trustee, in respect of land not subject to a trust for conversion.*

1. Upon acceptance of the trust—a fee of £5.

2. Upon raising any money under any trust or power in the trust instrument—a fee at the rate of 2*s.* 6*d.* for every £100 so raised. Minimum fee £1.

3. Upon the withdrawal from the trust property (whether upon transfer to or distribution amongst the beneficiaries or

otherwise) of the land, or the moneys or property representing the land, or any part thereof respectively—

(a) When the public trustee is acting as ordinary trustee a fee at a rate, for every £100, or part of £100, of the value of the property withdrawn, equal to the rate per cent. at which, in pursuance of clause 1 of head B, the fee would be payable if such withdrawal were an acceptance of a trust chargeable under that head and comprising only the property withdrawn : and

(b) When the public trustee is acting as custodian trustee only, one half of the fee payable under paragraph (a) of this clause—

Provided that a re-settlement of property subject to a strict settlement shall not be deemed to be a withdrawal within the meaning of this clause.

II.—Investment Fees.

In respect of the duties of the public trustee acting as ordinary trustee or executor or administrator or custodian trustee or in the administration of a small estate under s. 3 of the Act.

1. Upon any investment (other than a purchase of land, or any mortgage of, or charge on, property)—a fee at the rate of 10*s.* for every £100 invested (such fee to include any sum paid by the public trustee for brokerage).

2. Upon any purchase or sale of land, or any investment by way of mortgage of, or charge on, property—a fee at the rate of 2*s.* 6*d.* for every £100 of the purchase money or money advanced.

III.—Income Fees.

In respect of the duties of the public trustee acting in any of the capacities mentioned under Division II.

Upon the annual income of the trust property—a fee at the rate of £2 per cent. in respect of that income up to £500, and at the rate of £1 per cent. in respect of any excess of that income over £500. Provided as follows :—

(a) where income is paid direct to the person entitled,

or to his bank, or is collected by such person, the income fee shall not be charged in respect of that income at a higher rate than £1 per cent. ; and

(b) except where the public trustee is acting in the administration of a small estate under s. 3 of the Act the minimum income fee shall be 10*s.* 6*d.*

IV.—Audit Fees.

In respect of the duties of the public trustee under s. 13 *of the Act.*

Upon the performance of any duty under that section, such fee, not being less than 5*s.* or more than £5, as the public trustee shall determine in each particular case, regard being had to the time and trouble involved, the value of the estate and the other circumstances of the case.

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